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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-1832

ERNEST F. MITCHELL, JR., and ROSE L. MITCHELL,
Petitioners

vs.

FORD MOTOR COMPANY, A Corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners pray for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit and its orders denying Petitioners' Petition for Rehearing and Petitioners' Motion for Reconsideration.

REFERENCE TO THE REPORT OF THE OPINIONS DELIVERED IN THE COURT BELOW

A copy of the opinion of the Circuit Court of Appeals for the First Circuit dated March 29, 1976 is attached as Appendix A, infra. It is a published opinion which has not been given an official Federal Reporter citation as of the date of the printing of the Petition herein. A copy of the Petitioners' Petition for Rehearing is attached as Appendix B, infra. The Order and Memorandum of the Circuit Court of Appeals for the First Circuit on the Petition for Rehearing, etc. dated April 26, 1976

is attached as Appendix C. infra. Petitioners' Motion to Strike a Reference in the Order is attached as Appendix D, infra. Petitioners' Motion for Reconsideration is attached as Appendix E, infra. A copy of the Order of the Court on the Motion to Strike and the Motion for Reconsideration is attached as Appendix F, infra.

CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Statutory provision conferring on this Court jurisdiction to review the judgment of the United States Circuit Court for the First Circuit is *28 USC Section 1254 (1).*

The date of the judgment of the United States Circuit Court for the First Circuit sought to be reviewed herein is March 29, 1976 and the mandate issued therein is dated May 4, 1976.

The date of the Order relative to a Rehearing is April 26, 1976, and the Order on the Motion for Reconsideration is dated May 4, 1976.

The judgment of the Circuit Court of Appeals for the First Circuit resulted from that Court's making a ruling directly contrary to important New Hampshire law which should have been followed by the Court. The Court of Appeals failed to follow the standards of review applicable to the Federal Courts contrary to the decisions of other Federal Courts. The Court of Appeals denied Mr. and Mrs. Mitchell's basic constitutional rights of due process and a jury trial.

QUESTIONS PRESENTED FOR REVIEW

Diversity of citizenship civil jury cases were appropriately plead, proved and submitted to a Jury in the United States District Court for the District of New Hampshire involving a common law claim of negligent design of a product. The Jury returned verdicts for the Petitioners, Mr. and Mrs. Mitchell. The

Judge of the United States District Court for the District of New Hampshire approved the verdicts and denied various motions of the Respondent, Ford Motor Company. Ford Motor Company appealed to the United States Circuit Court of Appeals for the First Circuit. The Court of Appeals reversed and ordered judgment for the Respondent, Ford Motor Company because in the opinion of the Court of Appeals maintenance of the product had been neglected.

The questions presented for review are as follows:

1. Does the decision of the Court of Appeals for the First Circuit conflict with important law of the State of New Hampshire?
2. In a diversity case, should the Federal Court apply the State standards or the Federal standards relative to burden of proof and sufficiency of the evidence for a jury verdict?
3. In a diversity case, what standard should be used by the Court of Appeals in reviewing the decisions of the District Court Judge?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THIS CASE INVOLVES

I. Article 20, New Hampshire Constitution.

"In all controversies concerning property—and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, and except in cases in which the value in controversy does not exceed five hundred dollars, and title of real estate is not concerned **the parties have a right to a trial by jury and this method of procedure shall be held sacred**, unless, in cases arising in the high seas and such as relates to mariners' wages the legislature shall think it necessary hereafter to alter it." (Emphasis supplied).

II. Principle of Law of the State of New Hampshire set forth in *Murray* v. *Bullard,* 110 NH 220; 256 A 2d 309 and in

McLaughlin v. *Sears, Roebuck & Co.*, 1971, 111 NH 256, 268; 281 A 2d 587, 589, that neglect of maintenance of a product is a Jury issue.

III. **New Hampshire Revised Status Annotated 507:7-a.**

"**Contributory negligence shall not bar recovery in an action by any plaintiff,** or his legal representative, to recover damages for negligence resulting in death, personal injury, or property damage, **if such negligence was not greater than the causal negligence of the defendant,** but the damages awarded shall be diminished, by general verdict, in proportion to the amount of negligence attributed to the plaintiff; provided that where recovery is allowed against more than one defendant, each such defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. **The burden of proof as to the existence or amount of causal negligence alleged to be attributable to a party shall rest upon the party making such allegation.** This section shall govern all actions arising out of injuries and other damages sustained on and after August 12, 1969, and none other." (Emphasis supplied).

IV. Principle of New Hampshire Law that verdicts are rarely directed in favor of the party having the burden of proof on an issue as set forth in *Boothby* v. *Prescott,* 97 NH 504, at page 505; 92 A 2d 661.

"Verdicts are rarely directed in favor of the party having the burden of proof."

V. United States Constitution, Amendment VII.

"Trial by jury in civil cases. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and **no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."** (Emphasis supplied).

VI. United States Constitution, Amendment V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

CONCISE STATEMENT OF THE CASE

Petitioner, Ernest F. Mitchell, Jr., suffered serious permanent injuries when a Ford truck rolled on top of him. The Petitioner, Ernest F. Mitchell, Jr., obtained a verdict from a Jury in the United States District Court for the District of New Hampshire based on common law negligent design of the handbrake in the Ford truck. The Petitioner, Rose L. Mitchell, wife of the Petitioner, Ernest F. Mitchell Jr., obtained a verdict from the same Jury for her loss of consortium as permitted by the law of the State of New Hampshire. **New Hampshire Revised Statutes Annotated 507:8-a.**

Mr. Mitchell, a resident of Laconia, New Hampshire, purchased a five and one-half (5½) ton Ford truck for his business, a corporation called Mitch's Construction, Inc. The truck was purchased from a Mr. Clark in New Hampshire when it was a few months old and had been driven approximately 5,000 miles. The truck had been used quite often and numerous times by Mr. Mitchell and had been used by others for approximately a year from the time of purchase from Mr. Clark to the time of the accident. The truck had registered approximately 20,000 miles from the time of purchase from Mr. Clark to the time of the accident.

At Gilford, New Hampshire on June 15, 1973, while backing down a slight incline to connect with a trailer, Mr. Mitchell accidentally struck the trailer and started the trailer down the incline. Mr. Mitchell stopped the truck, took the motor out of gear, pulled on the handbrake, left the truck and pursued the trailer. The brake did not hold, and backed over Mr. Mitchell causing serious injuries. The brake would have held if it had been fully applied.

Mr. Mitchell is 5'4" tall and, accordingly, drove the truck with the seat all the way forward.

When the handbrake is in its original position, when fully applied it is usually on the fourth or fifth tooth of the thirteen teeth of the brake pawl. At the time of the accident, brake wear had increased the handbrake lever's "travel" and the position of the brake was such that the brake was on approximately the sixth or seventh tooth of the pawl when fully applied.

Mr. Boynton, the foreman of Mitch's Construction, Inc., who drove the truck at least 100 times before the accident, did not use the handbrake. When Mr. Mitchell drove the truck on other occasions before the accident, he used the handbrake for parking the truck with the motor always shifted into gear. On other occasions while using the handbrake before the accident, Mr. Mitchell did not encounter any difficulty in the application of the handbrake under the circumstances.

Both of the Plaintiffs' experts testified that because the handbrake lever was shorter than the level of the driver's seat, application of the brake was awkward. A proper design would have provided a longer brake lever to clear the top of the seat. One of the Plaintiffs' experts testified:

> "I . . . found that the parking brake handle was so short that it did not extend above the level of the seat upon which the operator sits. It was in such a position, far reaching to the right, and low to the seat, that it was extremely difficult to put this brake on to a point that would assure the operator that it was securely fastened. As you pull the brake rearward, the mechanical advantage is so poor because your arm has to come up and you put a component on the brake handle of pulling it off of the floor, really almost as much as you have pulling it to the rear. It is an extremely difficult situation. I would consider it dangerous."

Both of the Plaintiffs' experts testified that the defective design resulting in awkward application of the handbrake caused Mr. Mitchell's inability to fully apply the brake in the circumstances

of the accident.

The trial judge found both of the Plaintiffs' experts qualified and allowed in evidence their opinions. The Appellate Court also accepted the Plaintiffs' experts' opinions. Appendix A.

Ford provided an adjustment mechanism in the truck to compensate for the wear of the handbrake. About three weeks after the accident, a mechanical engineer hired by the Plaintiffs made an adjustment to the handbrake. Such an adjustment took three to five minutes by performing certain maneuvers under the truck.

The Plaintiffs' expert who made the adjustments had also been employed by Ford on other matters. He testified on cross-examination by Ford's counsel that his adjustment made the brake safe. It was still his opinion, however, that the lever was defectively designed because of its shortness. He also testified on cross-examination by Ford's counsel that the adjustment should be checked periodically and that a person is put on the alert for changing the adjustment if he finds it is getting too loose or that the handle is coming back too far.

The Supervisor of design analysis for Ford testified that the driver of the truck is not expected to make continuous adjustments to the handbrake and would not be expected to make adjustments unless he found the handbrake nonfunctional. The handbrake was functional at the time of the accident.

Mr. Mitchell has been employed in heavy construction work and as a laborer most of his life. He has a fifth grade education and he cannot read or write.

Mr. Mitchell testified that he was not aware of any adjustments or repairs to the handbrake before the accident. However, while the truck was owned and used by Mitch's Construction, Inc. for about a year before the accident, the truck was inspected by a garage as required by State Law and at the time of such inspections, the garage checked the brakes. While the truck was owned by Mitch's Construction, Inc. the truck also twice received warranty servicing by Genest Ford

Garage, Ford's dealer which originally sold the truck to Mr. Clark. Also, Mr. Boynton, the foreman of Mitch's Construction, Inc. who is 6'1" tall, performed regular servicing on the truck.

In addition to the oral testimony, at the trial the Jury received demonstrative evidence when, by agreement of counsel, they were permitted to view the scene of the accident and they viewed the interior and exterior of the **actual truck** involved in the accident. Also, at the trial the jury viewed motion picture films taken by Ford of the actual application of the handbrake.

The jury returned verdicts for Mr. and Mrs. Mitchell and assessed damages accordingly. The Judge of the United States District Court of New Hampshire, who heard and saw the evidence, approved the verdicts. On appeal, the Circuit Court of Appeals ordered judgment for Ford Motor Company. Appendix A. Ford had never argued that as a matter of law maintenance of the truck had been neglected but the Circuit Court of Appeals made its decision on a finding by the Appellate Court that maintenance had been neglected. Appendix A. The Appellate Court ruled directly contrary to important New Hampshire law and gave no weight to the determination of the District Court Judge that the law of New Hampshire permits a jury verdict for the Plaintiffs in this situation. The Plaintiffs raised the issue of the denial of due process and jury trial rights. Appendix B.

The United States District Court for the District of New Hampshire had jurisdiction over this case based on diversity of citizenship of the parties pursuant to **28 USC Sec. 1332.**

DIRECT AND CONCISE ARGUMENT

A. The Court of Appeals has decided, in direct conflict with New Hampshire law, the important question of the burden of proof of neglect of maintenance of a product and the sufficiency of the evidence for a jury finding relating thereto.

There is perhaps no right more important than the right of an

injured person to a jury trial on common law claims of negligence. Indeed, the New Hampshire Constitution declares this right to be "held sacred." *N.H. Const. Art. 20.* The instant case involves an arbitrary interference by the Court of Appeals with proper action by the local District Court judge and jury.

The New Hampshire Supreme Court has throughout history obeyed the mandates of the State's Constitution and refrained from judicial interference with jury verdicts. In the case of *Murray* v. *Bullard Co.,* 110 NH 220 (1970), 265 A.2d 309, the New Hampshire Supreme Court stated that the principle that the Defendant is not liable where injury results from a failure to keep the manufactured product in good working order is only another way of stating the principle of intervening cause. *Murray* v. *Bullard Co.,* supra at pages 223 and 225. The *Murray* v. *Bullard Co.* decision unequivocally states that this issue of negligent maintenance of the product is for the jury to determine. *Murray* v. *Bullard Co.,* supra at page 225. This was again restated by the New Hampshire Supreme Court in the case of *McLaughlin* v. *Sears, Roebuck* wherein the Court stated:

> "It was for the jury to say whether the accident resulted from normal rather than abnormal use or misuse of the ladder." *McLaughlin* v. *Sears, Roebuck,* 111 NH 259, at page 268 (1971), 281 A.2d 587.

In the instant case, the Circuit Court's ruling concluded as a matter of law that maintenance of the product had been neglected because Mr. Mitchell stated he was not aware of any repairs or adjustments to the handbrake during the year of his corporation's ownership of the truck before the accident. However, there was evidence that the brake had been checked and inspected at the required State inspections. There was also evidence that the truck had been serviced by a Ford garage on at least two occasions and was regularly serviced by the foreman of Mr. Mitchell's company. Moreover, Mr. Mitchell testified that he did not encounter any problems with the brake before the accident. Thus, under the circumstances in which he used the

brake before the accident he was *not aware* of any alleged need for adjustment of the brake. There was *no* evidence or claim at any time during trial or on appeal that the defective condition of the handbrake was obvious. Yet on appeal the Court of Appeals concluded that the defective condition was obvious as a matter of law.

The Court of Appeals ordered verdicts for Ford as a result of their opinion that Mr. Mitchell was contributorily negligent as a matter of law because of neglect of maintenance. But, the Statutory Law of New Hampshire clearly states that the *Defendant* (Ford) has the burden of proof on contributory negligence of the Plaintiff. The comparative negligence Statute *(RSA 507:7-a)* is well known to New Hampshire lawyers. It was pointed out to the Circuit Court in the Plaintiffs' Brief on appeal. The Circuit Court totally ignored this important Statute of the State of New Hampshire even though the District Court properly applied the Statute and submitted the issue of contributory negligence to the jury.

Furthermore, it is well settled basic New Hampshire law that verdicts are rarely directed for the party who has the burden of proof on an issue. *Boothby* v. *Prescott,* 97 NH 504, 505; 92 At. 2d 661, 662 (1952). This is even so on undisputed evidence if the evidence gives rise to conflicting inferences. This was recognized as the law of New Hampshire by the Court of Appeals for the First Circuit in an opinion handed down in 1973, written by Judge Campbell who did not participate in the decision in the instant case. *Wilson* v. *Nooter Corporation,* 475 Fed. 2d, 497 at page 501. Ford cannot claim that the instant case is one of those rare instances where a directed verdict can be given to the party who has the burden of proof.

The New Hampshire law does not permit the Court to interfere with a jury determination on the relatively simple facts of this case. It cannot be denied that the ruling by the Court of Appeals is in direct conflict with New Hampshire law on burden of proof and sufficiency of evidence for a jury verdict. This Court can transfer this question of law to the New Hampshire

Supreme Court under Rule 20 of the New Hampshire Supreme Court Rules. As an alternative, the Plaintiffs have filed a Motion for Certification to the New Hampshire Supreme Court for a decision from the New Hampshire Supreme Court on this important question. At the very least, the Plaintiffs should be entitled to have this Motion granted.

B. In diversity cases, the Court of Appeals for the First Circuit applies its own standards of burden of proof and sufficiency of evidence for a jury verdict. There is confusion and conflict among the Circuit Courts as to whether State or Federal standards on burden of proof and sufficiency of the evidence should be applied in diversity cases.

There can be no debate that the Rule of *Erie R. Co.* v *Tompkins,* (1938), 304 US 64 mandates that the Circuit Court of Appeals apply the State substantive law in diversity cases. The applicable State law in the instant case is the law of the State of New Hampshire.

The instant case involves a situation where the State principles of burden of proof and sufficiency of evidence hold that the jury verdict is justified but the Federal principles relating thereto hold that the jury verdict is not justified.

The traditional respect by the New Hampshire Supreme Court for the jury and its constitutional foundations has resulted in Court decisions in New Hampshire holding that the jury be allowed to find whatever facts are reasonably suggested by the evidence. The finding of a jury " . . . must be based on evidence sufficient to give reasonable men a belief that the finding they make is probably true." *DiPietro* v. *Lavigne,* 97 NH 474, 475, 476; 92 A 2d 914. The Court of Appeals for the First Circuit has given some recognition to a reasonable man test. *Dumais v. McLean,* 404 F 2d 1062. However, the limitations imposed by the First Circuit Court have restricted the freedom of jury determinations and has permitted regular interference with the jury by the Court. The First Circuit Court requires that

conclusions of fact be supported by "substantial evidence." *Carlisle* v. *Cross,* 386 F (2) 672 at page 674. The First Circuit Court states that it views

> " . . . the facts in the light most favorable to the plaintiff, but without neglecting the uncontradicted evidence introduced by the defendants." *Molinar* v. *Western Electric,* decided Nov. 12, 1975 after the instant case was argued and submitted F 2d (1975).

The New Hampshire Court does not allow any technical limitations on the reasonable man test and therefore the scope of freedom given to the jury in New Hampshire is left large and there is a minimum of interference with jury determinations.

Although New Hampshire Statutes place the burden of proof of contributory negligence on the defendant, the Circuit Court of Appeals for the First Circuit places the burden on the plaintiff to show that he was free from fault at least in product liability cases. There can be no doubt that the Circuit Court of Appeals for the First Circuit is of the opinion that it can apply its own standards as to the amount of evidence needed to sustain a verdict. *Carlisle* v. *Cross,* 386 F (2), 672, at page 674.

In the case of *Carlson* v. *American Safety Equipment Corporation,* decided January 8, 1976 the Court of Appeals for the First Circuit set forth the following standard:

> "Where, as here, the accident occurs after the defendant has surrendered control of the instrumentality involved, it is incumbent on the plaintiff to show that the instrumentality had not been improperly handled by . . . [plaintiff] . . . or by intermediate handlers." F 2d (1976).

Although the *Carlson* case was a Massachusetts diversity case, it sets forth the standard also used by the Circuit Court in the instant case which was decided on March 29, 1976.

It is clear that there is a substantial difference between the Court of Appeals and the New Hampshire Supreme Court as to the test to be applied in reviewing a jury verdict.

Whether the evidence is sufficient to create an issue of fact

for the jury is solely a question of law to be determined by the Court. The standard to be applied in diversity cases in passing on that question is very vague. *Dick* v. *New York Life Ins. Co.* (1959) 359 US 437, 79 S Ct. 921, 3 L Ed 2d 935. *Mercier* v. *Theriot* (1964) 377 US 152, 84 S Ct. 1157, 12 L Ed 2d 206. As stated in *5 Moore's Federal Practice Sec. 38:10 at pages 105, 106 and 107:*

> "The decisions in *Dick* and *Theriot* leave the matter very much confused. In the Fifth Circuit and the Ninth it has been held that a Federal standard applies. In the Second Circuit, on the other hand, while it is recognized that the *Erie* question is open, the Court has indicated that until the question of compulsory application of the Federal standard is settled the Court will continue to require submission to the jury in diversity cases in accordance with a State standard arguably more favorable to jury trial than the Federal. In the Eighth Circuit in which prior to *Dick* it had been held that State law would be applied, recent cases treat the matter as open. In the Third Circuit, while the decisions have been spoken of as 'displaying aberrent tendencies' the question is also regarded as open. The same is true of the Seventh."

It has been almost 40 years since the *Erie* decision and the Federal Courts are still uncertain and conflicting each other as to whether the level of evidence necessary to resist a directed verdict in diversity actions is a Federal or State matter. It is respectfully suggested that the Supreme Court of the United States should resolve this uncertainty by taking jurisdiction in the instant case.

C. Contrary to the decisions of Courts of Appeal of other Circuits, the Circuit Court of Appeals for the First Circuit gives no weight to the rulings of the District Court Judge of New Hampshire relative to the interpretation of the law of the State of New Hampshire.

The standard applied by the Circuit Court of Appeals of the Eighth, Ninth and Tenth Circuits relative to the weight to be

given to the decisions of the local District Court Judge relative to the local law of the State in which the District Court sits is that such determination will be accorded great weight by the Court of Appeals which will not adopt a contrary view unless convinced of error. *McCallister* v. *M/A/C Finance Co.* (Tenth Circuit), 332 Fed 2d 633; *Illinois Cent. R. Co.* v. *Stufflebean* (Eighth Circuit) 270 Fed. 2d 801; *Citrigno* v. *Williams* (Ninth Circuit) 255 Fed. 2d 675; and *Connet Lumber Co.* v. *New Amsterdam Casualty Co.* (Eighth Circuit) 236 Fed. 2d 117. In other words,

> "the Court of Appeals as a rule accepts the views of the trial court as to doubtful questions of law, including the adequacy of evidence to make a case for the jury, and in review by the Court of Appeals of such doubtful questions, the Court does not determine whether the trial Court reached a correct conclusion, but only whether it reached a permissible one." *32 Am. Jur. 2d, Federal Practice and Procedure, Section 394 at page 917.*

In conflict with the decisions of the Circuit Courts of Appeal of the Eighth, Ninth and Tenth Circuits relative to the conclusiveness of the District Court's decisions as to local law, the United States Circuit Court of Appeals for the First Circuit gives absolutely *no weight* to the decisions of the Judge of the District Court of New Hampshire as to questions of local law.

In the instant case, the Trial Judge, Honorable Hugh H. Bownes who has been the United States District Court Judge for the District of New Hampshire since his appointment on July 25, 1968, fully viewed the Plaintiffs' evidence including the testimony of witnesses and properly applied the law of the State of New Hampshire to that evidence. The District Court Judge denied the Motions of the Defendant in accordance with the local law of the State of New Hampshire and permitted the Jury determination to stand without interference by the Court.

At the trial, the jury, by agreement of counsel, was permitted to view the premises where the accident occurred and also view

the actual truck involved in the accident including the interior of the cab of the truck and the relation of the brake lever to the seat. The District Court Judge properly applied the law of New Hampshire which holds that what the jury perceives at the view is actual evidence to be considered by them in arriving at their verdict. *Chouinard* v. *Shaw,* 99 NH 26, 27, 104 A. 2d 522. On appeal the Court of Appeals gave absolutely no weight to the determinations of the Trial Judge. The Court of Appeals made its own de novo determination that it should reverse the District Court Judge and jury.

The Appellate Court did not have the opportunity to observe the witnesses and view the motion picture films that were shown during the trial. It did not have the opportunity to actually perceive the scene of the accident and the inside of the truck in question. The Court of Appeals does not have the knowledge of local law and practices as does the District Court Judge. It should be noted that the District Court Judge in the instant case was formerly a Judge of the New Hampshire Superior Court, the trial level Court of record of the State of New Hampshire.

This is not the first time the Circuit Court of Appeals for the First Circuit has given no weight to determinations made by the District Court Judge of New Hampshire as to the law of the State of New Hampshire in diversity actions. See, for example, the case of *Barrett* v. *Foster Grant Co.,* 450 Fed. 2d 1146 (1971) wherein the same Judge who authored the opinion in the instant case wrote an opinion which reversed a determination by the same New Hampshire District Court Judge. District Court Judge Bownes had ruled that New Hampshire law applied to the accident in that case. The Court of Appeals made its own de novo determination that Massachusetts law should have been applied even though the law of the State of New Hampshire provides for the weighing of certain considerations in determining the choice of applicable law. If the Court of Appeals gave any weight to the District Court's determination of the local law, it would not have interfered with the determination

of the District Court in the instant case or in the *Barrett* v. *Foster Grant Co.* case, supra.

This will not be the last time that the Court of Appeals for the First Circuit will accord no weight to the District Court's decisions as to local law unless this Court takes jurisdiction and sets forth the standard applicable to all Circuit Courts of Appeal. Such a standard should require that the District Court Judge's decision on local law be accepted and given special weight unless the determination of the District Court is shown to be clearly erroneous.

CONCLUSION

This case involves the substantial Federal question of the standards to be followed by the Circuit Courts of Appeal in reviewing determinations of local District Court Judges and Juries in diversity cases. The Circuit Courts of Appeals are in conflict as to whether the *Erie* decision requires that the Federal Court apply the State standards governing the level of evidence for submission of a case to a jury or whether the Federal Court can use its own standards. This is, indeed, an important question which requires resolution by the Supreme Court of the United States.

In the instant case, the District Court applied the State standard of proof and allowed the jury verdicts in favor of the Plaintiffs to stand. However, the Circuit Court of Appeals applied its own Federal standards and reversed the jury verdicts. It is respectfully requested that the United States Supreme Court take jurisdiction of this matter and rule that the State standards are applicable in this diversity case.

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APPENDIX A

UNITED STATES OF APPEALS FOR THE FIRST CIRCUIT

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,
Plaintiffs, Appellees,

v.

FORD MOTOR COMPANY,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

(Hon. Hugh H. Bownes, U.S. District Judge)

Before Coffin, Chief Judge,
Aldrich and McEntee, Circuit Judges.

Eugene M. Van Loan, III, with whom Wadleigh, Starr, Peters, Dunn & Kohls was on brief, for appellant.

David J. Killkelley, with whom Nighswander, Lord, Martin & Killkelley was on brief, for appellees.

March 29, 1976

ALDRICH, Senior Circuit Judge. This is a diversity action brought in the District Court for the District of New Hampshire against a manufacturer for personal injury allegedly due to a defectively designed brake lever (handle) on a dump truck. The

sole issue we reach is whether there was evidence to support the jury finding of liability.

On plaintiff's evidence plaintiff, a contractor, purchased the truck when it was a few months old, and had been driven about 5,000 miles. Approximately one year and 20,000 miles later, the accident occurred. Plaintiff was not the sole user of the truck, but he drove it regularly. On the day in question, while backing down a slight incline to connect with a trailer, he accidentally struck the trailer and started it down the incline. He stopped the truck, took the motor out of gear, pulled on the handbrake, left the truck, and pursued the trailer. The brake did not hold, and the truck backed over him. The brake would have held if it had been fully applied.

Plaintiff was 5'4" tall and, accordingly, drove the truck with the seat all the way forward. Because of brake wear, which increased the lever's "travel," if fully applied at the time of the accident the lever would have come to within three inches of the seat in the forward position. Plaintiff's experts testified that, because of its shortness this made application awkward, especially if the user employed a particular grip or grasp, and that, in their opinion, a proper design would have provided a longer lever to clear the top of the seat. Although defendant asserted a reason for the supplied length, we accept plaintiff's experts' opinion, but subject to other established factors which have a bearing on the ultimate conclusion.

As manufactured, the lever did not come close to the seat. Anticipating wear, defendant had provided a compensatory adjustment. After the accident such an adjustment was made. It took but minutes. While not, of course, determinative, there was no affirmative evidence that defendant was ever aware of a handle problem.[1]

1. Defendant offered to show, negatively, that it had sold this truck in large numbers for a period of years without any claim based on the design of the lever. Plaintiff objected, saying it was highly prejudicial, and that the rule allowing evidence of prior accidents "does not work in the negative." The court agreed. We need not reach this question, but note *Menard* v. *Cashman*, 1945, 93 N.H. 273, 274; *Pittman* v. *Littlefield*, 1 Cir., 1971, 438 F.2d 659, 662.

Before addressing basic principles, we must fault plaintiff's brief in two particulars. First, it says that the defect was not obvious. Secondly, it says plaintiff should not have to "continuously make an adjustment to the brake to fit his height" "every time (he) uses the truck." These are patent attempts to shift the facts to avoid the issues. Of course the defect – if it was a defect – was obvious. There was no suggestion that anything had gone suddenly wrong. Brake wear is gradual, and in the case of the handle's changed position, perceptible. We refrain from answering plaintiff's brief's other contention, that a condition that developed during 25,000 miles and had never been corrected, would require adjustment "every time he uses the truck."

Even the strict admiralty doctrine of unseaworthiness – liability without fault – does not require perfection. *See Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550; *Doucette* v. *Vincent*, 1 Cir., 1952, 194 F.2d 834, 837-38. There is probably little that could not be improved, or, at least, that some person having sufficient qualifications to be called an expert would not say could have been improved, selecting, after the event, which design would have been better. That, however, is not the test. As the court said in *Weakley* v. *Fischbach & Moore, Inc.*, 5 Cir., 1975, 515 F.2d 1260, at 1267-68,

> "[Plaintiffs] rely principally on an attempted showing that there were design alternatives which, had they been adopted, would have prevented the accident or minimized its consequences. Such a showing, by itself, is insufficient to establish liability . . .It is one thing to show that the defendant might have designed a safer product; quite another to show that the product he did design was unreasonably dangerous. The defendant is not obliged to design the safest possible product, or one as safe as others make or a safer product than the one he has designed, so long as the design he has adopted is reasonably safe. W. Prosser, The Law of Torts § 96 at 645 (4th ed. 1971)."

In *Brown* v. *General Motors Corp.*, 4 Cir., 1966, 355 F.2d 814, at 820, cert. denied, 386 U.S. 1036, the court said,

> "Failure to adopt the most modern, or even a better safeguard, did not render the manufacturer liable to the injured mechanic . . . There is no indication in the evidence that the shield was not at least a reasonable preventive of injury."

Brown was cited with approval by the New Hampshire court in *Murray* v. *Bullard Co.*, post.

To come to specifics, a manufacturer is not under a duty to supply materials that will not wear out. *McLaughlin* v. *Sears, Roebuck & Co.*, 1971, 111 N.H. 265, 268; 281 A.2d 587, 589. There the court said,

> "The duty of the manufacturer or supplier is limited to foreseeing the probable results of the normal use of the product or a use that can reasonably be anticipated. Prosser, Torts 667 (3d ed. 1964); . . . Clearly there is no duty to furnish a product that will not wear out."

Plaintiff points out that an expert witness, called by defendant, testified that he "wouldn't think he'd make any adjustments unless he found it non-functional." This is not only contrary to defendant's operating manual's instructions to check brakes, but is contrary to common sense. An emergency brake that must fail before attention is to be given it, by hypothesis cannot be depended upon in an emergency. Nor is this the law. The user of a mechanism that is known to be subject to wear must do more than simply repair it after it fails. The contrary opinion of some witness, even though he may qualify as an expert, does not change the result; questions of law are for the court. The law is that a manufacturer does not have to anticipate that maintenance will be neglected. In *Murray* v. *Bullard Co.*, 1970, 110 N.H. 220, 225; 265 A.2d 309, 313, the court approved the principle that defendant "is not liable where 'injury results from a failure to keep the manufactured product in good working order.' "

As was said in *Kaczmarek* v. *Mesta Mach. Co.*, 3 Cir., 1972, 463 F.2d 675, at 678,

> "Common sense dictates that there should be frequent if not periodic inspections and replacement of the worn parts as soon as they are detected."

Plaintiff's own expert testified,

"[T]he adjustment should be checked periodically; . . . you are put on the alert for changing the adjustment if you find it is getting too loose or that the handle is coming back too far." (R. 194).

Instead, plaintiff is claiming that a dump truck's brake assembly should be so perfect that he should not be required to maintain it, or make use of the adjustment feature provided, even though the wear was apparent, and that after 25,000 miles it should work as it did at the beginning.

Product liability in the individual case is paid for by the manufacturer, or its insurer, but in the long run whatever standard has to be met is reflected in the cost of the product. A standard that would permit an owner to neglect wear which is expectable and apparent, not to mention easily remediable by a design provision, imposes altogether too high a burden.

Reversed. Judgement for the defendant.[2]

2. In fairness to the district court, since no case cited in this opinion, except one in the footnote, was furnished us by the defendant, presumably none was to it. Where a verdict runs into six figures we believe courts have a right to expect a modicum of diligence on the part of counsel.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 75-1176

EARNEST F. MITCHELL, JR., et al.,
Plaintiffs, Appellees

v.

FORD MOTOR COMPANY,
Defendant, Appellant

PETITION FOR REHEARING

Introductory statement pursuant to Rule 15 of the Rules of the United States Court of Appeals for the First Circuit: The arguments and matter set forth in this Petition for Rehearing were not presented to the Court before because the Defendant, Ford Motor Company, never presented to the Trial Court or the Appellate Court the reasoning stated in the Court's opinion, the Plaintiffs did not anticipate that this Court would misconstrue the Plaintiffs' argument, the Plaintiffs were not aware until the Court's decision that there was to be any claim that the defect or dangerous condition of the product was obvious as a matter of law, and the Plaintiffs were not on notice of the misapprehension of the facts and the misapprehension of the points of law as stated herein below until the Circuit Court's decision.

The Plaintiffs in the above-entitled matter respectfully petition for a rehearing and they specifically assign as reasons therefor the following:

1. In its decision, the Circuit Court appears to state that the Plaintiff, Ernest F. Mitchell, Jr., was the owner of the truck involved in the accident. On the contrary, the evidence showed

that the truck was owned by Mitch's Construction Company, Inc. Mr. Mitchell testified that he purchased the truck for the business (R. 282) which was called Mitch's Construction Company, Inc., a corporation. (R. 281 and Exhibit 13 including corporate income tax returns).

2. In its decision, the Circuit Court claims at page 2 that Ernest F. Mitchell, Jr. used the truck in question "regularly". The extent of use made by Mr. Mitchell of the truck was clearly a jury issue. Mr. Mitchell testified he used the truck "quite often" and "numerous times". (R. 320). It was a question of fact as to whether Mr. Mitchell used the truck regularly or irregularly. The Court should not have held that as a matter of law the Plaintiff used the truck "regularly".

3. At page 3 of its decision, this court claims:

> "... if fully applied at the time of the accident the ... (brake) ... lever would have come to within three inches of the seat in the forward position."

This is not correct. The only measurement given for this distance was the measurement determined by Mr. Cromwell in March of **1974** as shown on Plaintiffs' Exhibit 27 attached as Appendix to Plaintiffs' Brief. The accident occurred on June 15, **1973**. The jury could conclude that the distance may have been more. This was a question of fact and this Court should not have concluded as a matter of law that the lever was three inches from the seat at the time of the accident.

4. At page 3 of this Court's opinion the Court claims:

"As manufactured, the lever did not come close to the seat."

This statement is not correct. The brake lever was improperly **located** close to the seat "far reaching to the right." The jury had the opportunity to view the truck, the brake's location, and to accept the following testimony of Mr. Cromwell, Plaintiffs' expert:

> "I ... found that the parking brake handle was so short that it did not extend above the level of the seat upon which the operator sits. It was in such a position, far reaching to the right, and low to the seat, that it was extremely difficult to put this brake on to a point that would assure the operator

> that it was securely fastened. As you pull the brake rearward, the mechanical advantage is so poor because your arm has to come up and you put a component on the brake handle of pulling it off of the floor, really almost as much as you have pulling it to the rear. It is an extremely difficult situation. I would consider it dangerous." (R. 362).

The brake lever was improperly located in the truck close to the seat as manufactured. The jury could easily come to this conclusion. The Appellate Court should not have concluded otherwise.

5. At page 3 of its opinion, this Court claims:

"Anticipating wear, Defendant had provided a compensatory adjustment." Ford **never** claimed that the adjustment feature in the emergency brake system was for the purpose of protecting the driver from seat interference in the application of the emergency brake. This common adjustment feature is provided for the proper **functioning** of the brake. Ford's supervisor of design analysis admitted this. Ford **never** claimed otherwise in any of the testimony in this case. Ford **never** claimed the adjustment feature was to be used to compensate for a defect in the design of the height and location of the brake lever.

6. This Court ruled as a matter of law that:

"The defect ... was obvious." (Page 4 of the opinion).

In the District Court, the Trial Judge and the jurors had the opportunity to observe the witnesses who testified and their demeanor. They had the opportunity to view motion picture films of the application of the brake in this type of truck and the location of the brake in relation to the seat and how it is applied. (Defendant's Exhibit 34 for Identification). Indeed, at the view the jurors had the opportunity to examine the **actual truck** involved in this accident. They viewed the brake handle, the brake lever, and the seat. They were able to determine the emergency brake's relation to the seat. The jurors, representing a true cross-section of the community, applied their common experience to all of this evidence. The conclusion is inescapable that the seat interference with the proper application of the brake was **not** open and obvious. The supervisor of design

analysis for Ford Motor Company (R. 518) claimed that there was no seat interference. (R. 424). There was admitted in evidence, a series of photographs taken, and the motion picture films, all presented by Ford claiming there was no seat interference in the application of the brake. See Plaintiffs' Exhibit 30 (1-33) consisting of 33 photographs presented by Ford. Also, the motion picture film, Defendant's Exhibit 34 for Identification. The record in this case does not in any way justify a ruling as a matter of law that the dangerous condition caused by the defect in the design of the hand brake was obvious to the ordinary person. The supervisor of design analysis for Ford testified that there were no "problems with seat interference . . . with the seat in the fully forward position." (R. 424). Ford, therefore, continually denied there was a defect or any dangerous condition. If the supervisor of design analysis from Ford Motor Company says that he sees no dangerous condition, then it certainly is at least a jury issue as to whether the dangerous condition is apparent to the ordinary person. As part of its ruling that the defect was obvious, this Court has ruled as a matter of law that the brake " . . . handles changed position . . . (is) . . . perceptible." (Page 4 of the opinion). This is not correct. When the brake is adjusted in its original adjustment, the brake goes to the fourth (4th) or fifth (5th) tooth of the pawl when the brake is in its applied position. (R. 639). There are thirteen (13) teeth on the pawl. (R. 185, 638 and 639). Photographs were taken when Mr. Edelen, Ford's expert, made his inspection of the truck in October of 1974. (R. 521). The jury could conclude that the brake was in the same condition of adjustment in October of 1974 as it was in June of 1973 at the time of the accident. Compare photographs, Plaintiffs' Exhibit 30 (1-33) with Plaintiffs' Exhibit 8-C. Yet, Mr. Edelen found the brake to be in the **sixth (6th)** tooth of the pawl in its applied position at the time of his inspection of the truck. (R. 639). Mr. Carroll, who examined the truck within a month after the accident, testified as follows on cross-examination:

"Now, when you normally apply this brake, when a person normally applies it, he would go back to have it in a full

position, would you say, half way, the fifth or sixth tooth, seventh tooth, in that area?

A. Approximately, yes."

(R. 185). The jury could easily conclude that the brake was in the sixth (6th) tooth on the pawl at the time of the accident. It is most unfair for the Appellate Court to conclude as a matter of law that the "travel" of the brake handle from the fourth (4th) tooth to the sixth (6th) tooth on a pawl of thirteen (13) teeth is "perceptible." Common everyday experience would lead an ordinary person to conclude otherwise. The issue of the openness and obviousness of the defect or dangerous condition was at the very least a jury issue.

7. On page 4 of this Court's opinion, this Court states:
"There was no suggestion that anything had gone suddenly wrong." On the contrary, the Plaintiffs' claim, through their experts, was based on the fact that the brake could not be properly applied in an **emergency** situation. In this case there was a sudden inability to fully apply the brake in an emergency because of the combination of the improper location and height of the lever. The improper application of the emergency brake in an **emergency** was argued throughout the Plaintiffs' Brief, see particularly page 44 of Plaintiffs' Brief. There was no evidence that Mr. Mitchell had ever had any need to previously apply the emergency brake in a sudden emergency. The interference with the brake's proper application created an active dangerous condition only when the brake had to be applied in an emergency or sudden stress situation. This claim of the Plaintiffs was advanced in both experts' reconstruction of this accident. An emergency brake which cannot be applied properly cannot be depended upon in an emergency. The Plaintiffs' case was based on the sudden manifestation of the defect in the design of the brake because of the emergency. The Court overlooked this part of the Plaintiffs' argument and evidence.

8. On page 4 of this Court's opinion, it is stated:
"We refrain from answering Plaintiffs' Brief's other contention, that a condition that developed during 25,000 miles

and had never been corrected would require adjustment 'every time he uses the truck'."

The Court has misconstrued the Plaintiffs' argument. Plaintiffs did **not** contend in their Brief that the "condition" of the brake would require adjustment every time the driver uses the truck. The Plaintiffs Brief reveals that the Plaintiffs claimed in their Brief that the manufacturer could not expect constant adjustments to the brake. See Plaintiffs' Brief, page 6, wherein it is stated:

"Relying on constant adjustment of the brake . . . to keep it in its original tight adjustment without allowing any 'travel' of the brake handle certainly is not jusified."

The supervisor of design analysis for Ford agreed that one would expect that the seat in the cab of the truck would be adjusted to fit the driver's height every time a person uses the truck but constant adjustment is not expected relative to the riser under the seat or the brake adjustment feature. (R. 610 and 611). Plaintiffs' Brief, page 7. The adjustments made to the emergency brake by a mechanic are determined by considerations of keeping the brake functional. Furthermore, the Plaintiffs **never** contended that any "condition" developed during 25,000 miles. Nor that the "condition" had "never been corrected." In the Court's opinion at pages 8 and 9, the Court states:

" . . . Plaintiff is claiming that a dump truck's brake assembly should be so perfect that he should not be required to maintain it, or make use of the adjustment feature provided, even though the wear was apparent, and that after 25,000 miles it should work as it did in the beginning"

The Plaintiffs **never** made these claims. The Court is ruling as a matter of law that: (a) Mr. Mitchell did not properly maintain the truck; (b) he did not make use of the adjustment feature; (c) wear was apparent; and, (d) the brake wore for 25,000 miles. On the contrary, there was more than adequate evidence in this case from which a jury could conclude that the truck **was** properly maintained, the adjustment feature was reasonably utilized, the "wear", if there was any wear, was not apparent and the brake lining did not wear during 25,000 miles of use.

Mr. Mitchell had used the emergency brake when he used the truck but the Company had as many as four other employees. (R. 281). Obviously it is not the amount of mileage traveled but the number of times and the manner of application which determines the amount of wear of the brake lining. It would be reasonable for the jury to conclude that Mr. Mitchell's use of the truck may have only been ten or twenty percent of the time, in other words, approximately 2,000 to 4,000 miles. Mr. Boynton, the foreman of Mitch's Construction Company, Inc., usually used the truck in question. He testified that he **didn't** use the emergency brake. (R. 72). The jury could conclude that the brake lining did not wear to any degree during the use of the truck before the accident. It is unfair for the Appellate Court to conclude otherwise as a matter of law. Also, the jury could have concluded certainly that any wear of the lining was not apparent to the ordinary person. The change of the brake from the fourth (4th) tooth to the sixth (6th) tooth on the pawl is so minimal that it is manifestly unfair to conclude that such "wear" is "apparent" as a matter of law. Furthermore, there was abundant evidence in this case from which a jury could definitely conclude that the brake assembly of the truck involved in the accident **was** properly maintained and reasonable use made of the adjustment feature. Mr. Warren Boynton, foreman of Mitch's Construction Company, Inc., was in charge of general maintenance of equipment. (R. 329). Although Mr. Mitchell stated that he had no "knowledge" of adjustments or repairs to the brake, he did state that he had the truck inspected as required by the State and that when that was done, the garage would " . . . check everything. They would check the brakes, the whole works . . ." If they found something wrong:

"They either repair it or they don't put a sticker on it." (R. 329).

From this testimony the jury could certainly conclude that Mitch's Construction Company, Inc. had reasonable maintenance done to the truck including full checking of the brake assembly at least semi-annually. The jury could conclude that this conformed to the standard of care of the ordinary prudent truck owner. **In addition**, before the accident the truck had

been taken to Genest Ford Garage on at least two occasions for warranty servicing. (R. 71). It is reasonable to assume that Ford's dealer checked the brake assembly and properly performed maintenance when the truck was at its garage. It is, therefore, most unfair for this Court to now conclude that the truck or the brake assembly was not properly maintained. Also, Mr. Boynton performed minor servicing on the truck, (R. 71), to keep it in proper condition. Under all these circumstances, it would be perfectly reasonable for the jury to conclude that Mitch's Construction Company, Inc. did properly maintain the truck in accordance with what an ordinary truck owner would do under the circumstances.

9. It appears that this Court has ruled as a matter of law that the manufacturer is not liable because it should not have to anticipate the circumstances of this accident. Such a decision misapprehends the facts and the law. The instant case involves the failure of the manufacturer to use due care in the design of a product. There is absolutely no question that the manufacturer should have anticipated that this Ford truck would be used in an emergency situation with the seat in its most forward position and the brake lever at approximately the sixth (6th) tooth on the brake pawl. Ford never claimed otherwise. It is contrary to all legal principles for this Court to rule as a matter of law that the manufacturer could not reasonably anticipate such a situation.

10. The reasons set forth in this Court's opinion were never advanced by Ford in the District Court. This was pointed out on page 20 of the Plaintiffs' Brief. This Court seems to be relying on its own conclusion that the emergency brake in the truck in question was in need of adjustment as a matter of law at the time of the accident. This was a jury issue and the Trial Judge properly submitted this issue to the jury. The jury could believe the Ford supervisor of design analysis when he testified that the adjustment position of the brake as found by Mr. Carroll after the accident was not "improper." The supervisor of design analysis was asked at the time of his video tape deposition to view the enlarged photograph taken by Mr. Carroll shortly after the accident. This photograph was marked

as Plaintiffs' Exhibit 9 and is reproduced in smaller print as Exhibit 8-C on page 510 of the Appendix. The video tape deposition was presented to the trial judge and jury as part of the evidence in this case. While viewing the enlarged photograph (Exhibit 9) the supervisor of design was asked:

> "Assume that that is in the applied position on that photograph . . . is the adjustment of the brake in any way improper for it to be in the position that it is?"

The jury was entitled to believe the immediate answer of the design supervisor, namely:

> "It doesn't look like it to me." (R. 627).

Ford's representative did not even find anything improper with the adjustment position of the emergency brake at the time of the accident. This Court has unfairly ruled on appeal in direct contradiction to the facts as they were presented to the Trial Judge and jury.

11. The legal principles set forth in the cases cited in this Court's opinion were never advanced by Ford. In fact, the cases cited in this Court's opinion do not justify this Court's conclusion. The admiralty case of *Mitchell* v. *Trawler Racer, Inc.*, 362 US 539 cited on page 5 of the opinion involved a case which was reversed because of an improper instruction to the jury. The case was returned to the Trial Court for a trial on jury issues. The admiralty case of *Doucette* v. *Vincent*, 194 F 2 834 cited on page 5 of the Court's opinion dealt with the issue of whether a trial judge abused his discretion in excluding evidence. This Court's opinion at page 5 cites the case of *Weakley* v. *Fischbach & Moore, Inc.*, 515 F (2) 1260, for the proposition that the fact that there are other design alternatives available is not a sufficient standard. The *Weakley* case held that there was:

> " . . . a consensus among electricians and designers that the equipment in question was safe if properly installed. There was also uncontradicted testimony that the design of the isolator switch was consistent with good engineering practice, . . . electricians and designers were agreed that the substitution of jumper wires for the door switches was a substantial and unjustified departure from design require-

ments . . . Against this evidence that the equipment was reasonably safe as designed, Fischbach and Moore mustered little contrary evidence . . . (page 1268) . . . it produced no expert testimony to support its contention that the design was unreasonably dangerous." Page 1269.

The evidence in the instant case was substantially different from the *Weakley* case. In the instant case, two experts for the Plaintiffs testified that the design of the emergency brake's location and height did **not** conform to good engineering practices. Ford did **not** offer any expert testimony that the brake did conform to good engineering practices. The Plaintiffs' experts were virtually uncontradicted. The *Weakley* case is not applicable to the facts of the instant case. This Court's opinion at page 6 cites the case of *Brown* v. *General Motors Corp.,* 355 F (2) 814. The *Brown* case held that acts of the plaintiff and co-employee in touching a starter button to rotate a drive shaft facilitating lubrication established utter want of compliance with the condition that the machine be operated in the manner intended. The decision claimed that the co-employee was "gropping in the dark." 355 F(2), at page 820. In the *Brown* decision there was **no** expert testimony that the manufacturer was negligent in removing a micro switch and substituting therefor a shield. The plaintiff claimed there should have been a micro switch but presented no evidence that lack of a micro switch was negligence. The evidence in the instant case differs substantially from the *Brown* case. In the instant case there was substantial evidence, through experts, that Ford was negligent in the design of the emergency brake. Also, on page 6 of this Court's opinion, it is stated that:

> *"Brown* was cited with approval by the New Hampshire Court in *Murray* v. *Bullard Co.,* post."

The *Murray* v. *Bullard Co.* case, 110 NH 220 cited the *Brown* case merely for the general principle that a manufacturer is entitled to assume that a product will be put to normal use. *Murray* v. *Bullard,* 110 NH at page 225. In its opinion at page 8, *Kaczmarek* v. *Mesta Mach Co.,* 463 F (2) 675 is cited by this Court. The *Kaczmarek* case involved an action against a manufacturer of a chain used as a component part of a pickling

machine. The machine had malfunctioned. There were no witnesses because the injured party died. Experts testified that the chain caused the accident. However,

> "No evidence is present in the record going to the specific nature of the defect in the chain." 463 F (2) at page 678.

Also, the chain had changed from a one-inch density as supplied as a result of two years use. 463 F (2) at page 678. The *Kaczmarek* case is substantially different from the instant case. In the instant case there was expert evidence of the specific nature of the defect in the brake. In the instant case, as stated before, there was sufficient evidence for the jury to determine that the product was being used as was reasonably anticipated by Ford. The abstract legal principles cited in the Court's opinion do not justify taking this case from the jury since there was abundant evidence to establish that there was no violation of the mandates of these principles.

12. This Court's decision is contrary to the law of New Hampshire. Under well-established principles, this Court is obligated to apply the law of New Hampshire to the evidence in this case. There is no question that the Supreme Court of New Hampshire would hold that there was sufficient evidence in this case to support the jury's finding of liability. In fact, no case can be found throughout the country which goes as far in taking issues from the jury as this Court's opinion in the instant case. Only two New Hampshire decisions are relied upon by this Court in its opinion, namely, *Murray* v. *Bullard,* 110 NH 220 at page 8 of the opinion and *McLaughlin* v. *Sears Roebuck & Company,* 111 NH 265, at page 7 of the opinion. The Court cites the case of *Murray* v. *Bullard Company* for the principle that the Defendant is not liable where injury results from failure to keep the manufactured product in good working order. The *Murray* v. *Bullard* decision upheld a verdict for the Plaintiff against a manufacturer of a machine and held that this principle is the same as the principle of "intervening cause". See page 222 of 110 NH 220. The New Hampshire Supreme Court held that the Defendant's seventh request for instructions to the jury in that case, namely:

> "If you find that the Plaintiff's injuries were solely due to an

independent intervening cause, namely, the failure of . . . the Plaintiff's . . . employer . . . to properly keep the clutch . . . in proper adjustment, which the Defendant . . . could not reasonably be found to have the duty to foresee, and that this failure was the proximate cause of the injuries, then you must bring back a verdict for the Defendant."

In other words, the New Hampshire Supreme Court has stated that the issue of the failure to keep the manufactured product in good working order is a **jury issue.** In the instant case, the jury could very well conclude that the truck in the instant case had been properly maintained under the standards of what would be required of an ordinary truck owner. The instant case is no different from the *Murray* v. *Bullard* decision. In its opinion, this Court has also cited the New Hampshire case of *McLaughlin* v. *Sears Roebuck & Company.* The *McLaughlin* case specifically *sustained an exception to a non-suit* and granted the plaintiff a new trial based on the New Hampshire Supreme Court's determination that it was a **jury issue** as to whether the use of the manufactured product constituted a misuse or an abnormal use for which the manufacturer was not responsible. In the **McLaughlin** case the Court also stated that:

" . . . a manufacturer or supplier has distributed a defective product when it is so fragile that it's anticipated use is likely to create a dangerous condition." 111 NH 265 at page 268.

There is no case in New Hampshire which has ever held that these issues can be taken from the jury by judicial fiat. In the instant case, the Trial Judge, who was in a better position to judge the quality of the evidence and who is familiar with the New Hampshire law, found that a jury issue exists.

13. In the instant case, the Plaintiff is not claiming that the brake assembly should be perfect and that he not be required to maintain it or make use of the adjustment feature. The Plaintiff is only maintaining that the location and height of the brake lever should have been designed so as to be **reasonably** safe for a use that could **reasonably** be anticipated. These were **jury** issues.

14. It was for the **jury** to say whether the accident was caused by improper maintenance of the truck. It was for the **jury** to say whether the owner of the truck neglected to make

proper use of the adjustment feature provided. It was for the **jury** to say whether the "wear," if any, was apparent. It was for the **jury** to determine whether the wear, if any, of the product was "easily remedial by a design provision." All of the above determinations were made as a matter of law by the Circuit Court when, in fact, there was abundant evidence from which the **jury** could reasonably reach a contrary conclusion.

15. For all of the reasons set forth in this Petition, the Plaintiffs will be denied constitutional rights of due process and trial by jury if this Court permits its present decision to stand.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,
Plaintiffs, Appellees,

v.

FORD MOTOR COMPANY
Defendant, Appellant.

Before Coffin, Chief Judge,
Aldrich and McEntee, Circuit Judges.

MEMORANDUM AND ORDER ON PETITION
FOR REHEARING, ETC.

Entered April 26, 1976

The petition for rehearing makes points that fall into two categories. The first falls outside the prime purpose of a petition, viz., to present errors of consequence that might reasonably be thought to have materially affected the outcome. It is totally irrelevant to the decision that we spoke of plaintiff, rather than the corporation, as being the truck's owner.* The difference between driving "regularly," and "quite often," is equally frivolous. So, too, so far as the present posture is concerned, is what plaintiff claims defendant claims.

* Note that Plaintiff in his opening, spoke of "his 1972 Ford truck," and in his testimony referred to the corporation as his "own construction business," and that he was in "business for [him] self."

Secondly, in addition to being of substantive importance, a petitioner's contentions must be consistent with his position at the trial. We cannot accept plaintiff's present contention, twice repeated, that the jury could find that "the truck was properly maintained, the adjustment feature was reasonably utilized." (Emphasis in orig.) Plaintiff himself testified that so far as he was aware "no adjustments or repairs of any type had been made to that handbrake." No witness testified to the contrary.

Equally inconsistent is his objection to the court's statement that the lever at the time of the accident came to within 3" of the seat, when "the distance [then] may have been more." Plaintiff's brief relied on his expert's opinion, which predicated 3". Of more general import, the whole theory of the experts, and of plaintiff's brief, was that the lever was too close to the seat – "interference with the seat when the seat was in its most forward position." If we made the distance too short, this was not a mistake in plaintiff's disfavor.

Finally, we note plaintiff's present claim that the jury could have found that the brake lever was located too close to the seat in the first place, and that any wear was imperceptible. We pass the inconsistency between this and the complaint discussed in our previous paragraph, but cannot pass over what plaintiff advanced in his opening as the theory of his case.

> "[A]s the brake lining wears, which is anticipated, then the travel of the lever of the brake then becomes greater in its rearward movement, and the wearing of the brake lining makes the travel, as I say, of the rearward movement of the brake greater. The function of the brake is still adequate, but with use, as it is applied, its travel goes further. And, as it would travel further rearward, this risk of interference with the seat would become greater. If a person of short stature is in the truck, the truck [sic] has to be in its most forward position, and if the brake lining was worn, which can be anticipated **and seen by the driver**, then you have the interference as is shown in the photograph which is before you." (Emphasis suppl.)

This language was substantially repeated in plaintiff's brief on appeal. His witness's testimony corresponded. But if we were to

think the record permitted plaintiff's present argument, then he is in the position of having driven the truck for over a year during all of which time the seat interfered with the proper application of the brake.

The petition is denied, as are plaintiff's other motions.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 75-1176

ERNEST F. MITCHELL, JR., et al
Plaintiffs, Appelless

vs.

FORD MOTOR COMPANY
Defendant, Appellant

MOTION TO STRIKE FROM MEMORANDUM AND ORDER ENTERED APRIL 26, 1976 THE REFERENCE TO PLAINTIFF'S OPENING STATEMENT, OR FOR ALTERNATIVE RELIEF

NOW COME the Plaintiffs, Ernest F. Mitchell, Jr. and Rose L. Mitchell, in the above-entitled matter and respectfully move to strike from the Memorandum and Order on Petition for Rehearing, etc., entered by this Court on April 26, 1976 the reference to the Plaintiffs' Opening Statement wherein it is quoted **"and seen by the driver . . ."** or, in the alternative, remand this case for an evidentiary hearing on the correctness of this statement in the record, and the Plaintiffs assign as reasons therefor, the following:

1. The statement reported therein was not correctly reported. The Plaintiffs' counsel's position was that the conditions stated can be anticipated **and foreseen by the designer.**

2. In the very next paragraph of the Opening Statement, Plaintiffs' counsel related the claim that the designer had the duty to warn of these conditions. (R. 23). In fact, the entire

Opening Statement in the paragraphs preceding and following the quoted language related to the designer's responsibilities (R. 22 and 23). The quoted report of the Opening Statement is clearly a mistake.

3. Allowing the present record to stand will be unjust.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 75-1176

ERNEST F. MITCHELL, JR., et al
Plaintiffs, Appellees

vs.

FORD MOTOR COMPANY,
Defendant, Appellant

MOTION FOR RECONSIDERATION

NOW COME the Plaintiffs, Ernest F. Mitchell, Jr. and Rose L. Mitchell, in the above-entitled matter and respectfully move that this Court reconsider its order denying Plaintiffs' Petition for Rehearing and other motions, said order entered April 26, 1976, and the Plaintiffs assign as reasons therefor, the following:

1. The record reveals that the Plaintiffs' Petition for Rehearing and Application for In Banc Rehearing was presented to three judges who voted not to rehear this matter in banc. The record also reveals that one of the judges voting on whether to rehear the case in banc is a senior judge. In the case of *Moody* v. *Albemarle Paper Company*, decided June 17, 1974, 417 US 622, 41 L. Ed. 2d 358, 94 S. Ct. 2513, the United States Supreme Court held that a senior judge may **not** participate in the determination whether to rehear a case in banc. The *Moody* case was cited by the Plaintiffs in their application previously filed.

2. The reported decision of this Court is based on an assumption by this Court that the awkward application of the

emergency brake must have been known by Mr. Mitchell before the accident and, therefore, could have been corrected by brake adjustment. This is an issue which was raised by the Court in its reported decision although **never** argued at trial or on appeal.

3. It was clearly the Plaintiffs' position at trial that Mr. Mitchell " . . . had used the parking brake during his use of the truck before the accident and **never had any particular difficulty under the circumstances in which he used it before the accident in June of 1973.**" R. 24. Plaintiffs' Opening Statement. (Emphasis supplied).

4. This Court failed to consider in ruling on the Petition for Rehearing the fact that the sudden stress emergency application of the emergency brake was the circumstance which made the awkward application of the brake a situation where "something suddenly went wrong."

5. In the ruling on the Petition for Rehearing this Court states that it was the Plaintiffs' trial and appellate position that the conditions were known by the driver. On the contrary, Mr. Mitchell testified that he didn't " . . . encounter any difficulty in using the brake prior to the accident." R. 284. **None** of the witnesses in this case testified that the dangerous conditions were obvious to Mr. Mitchell. Even Mr. Carroll, whose testimony was relied upon heavily by this Court in its reported decision, did not state that the conditions were obvious. Of course, Mr. Carroll does work for Ford (R. 158 and 159; See the NH case of *Alvin Greenland* v. *Ford Motor Company,* decided October 31, 1975, involving a verdict for Ford in which Mr. Carroll was the expert who testified for Ford) and the weight of his testimony should have been determined by the jury. This Court now says that the position that the brake wear conditions were seen by the driver "was substantially repeated in Plaintiffs' Brief on appeal." This Court in its reported decision criticized the Plaintiffs for arguing in their Brief that the defect was not obvious, but now it is claimed in the order of April 26, 1976 that Plaintiffs' Brief admitted that the brake wear was perceptible. Plaintiffs' original pleadings stated:

"On June 15, 1973, the Plaintiff, Ernest Mitchell, Jr., **who**

was unaware of said defects . . . (R 5) . . . The Defendant, Ford Motor, had **no reason to believe** that the Plaintiff, Ernest F. Mitchell, Jr. **or anyone in the position of the Plaintiff would realize the dangerous defects** and conditions of said truck." (R. 6) (Emphasis supplied).

The Plaintiffs continuously maintained this position right through appeal to this Court. The mistake in the reporting of the Opening Statement should not, in fairness, be relied upon to claim the Plaintiffs took a position contrary to that actually taken.

6. This Court did not consider the constitutional issues raised in the Petition for Rehearing. Seventh and Fourteenth Amendments to the United States Constitution.

7. Any evidence quoted by this Court from the transcript to attempt to justify its view of the facts can be controverted by stronger evidence quoted by the Plaintiffs to justify their position. No matter how many facts can be viewed one way or another, there is one fact which cannot be denied, namely, that this Court has taken from Mr. and Mrs. Mitchell something that is rightfully theirs, the right to a jury trial, a right which the New Hampshire Constitution has declared to be "held sacred." Article 20, New Hampshire Constitution.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,
Plaintiffs, Appellees,

v.

FORD MOTOR COMPANY,
Defendant, Appellant.

Before Coffin, Chief Judge,
Aldrich and McEntee, Circuit Judges.

MEMORANDUM AND ORDER ON MOTIONS
TO STRIKE, ETC.

Entered May 4, 1976

Per Curiam. Without pausing to weigh the pros and cons, the Court is content to accept Plaintiff's statement, and to substitute plaintiff's phrase "and foreseen by the designer," for the transcript phrase "and seen by the driver." (Also to strike the phrase "(Emphasis suppl.)."

This does not affect the result. The purpose of making this quote was to point out that Plaintiff's case was predicated on there having been wear, which changed the location of the lever vis-a-vis the seat. If the substitution is made, so as to say that the change should have been foreseen by the designer, it is still a claim that there was in fact a change – or there would have been nothing to foresee, or operative negligence.

We stand on the rest of our opinion and prior memorandum. Plaintiff's claim that he was unconstitutionally deprived of a jury trial, taken at its face value, would mean that a verdict could never be directed.

Except as above, all motions are denied.

Supreme Court, U. S.
FILED
JUN 21 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-1832

ERNEST F. MITCHELL, JR., and ROSE L. MITCHELL,
Petitioners

vs.

FORD MOTOR COMPANY, A Corporation,
Respondent

MOTION FOR CERTIFICATION OF QUESTION OF LAW
TO THE NEW HAMPSHIRE SUPREME COURT
PURSUANT TO RULE 20
OF THE NEW HAMPSHIRE SUPREME COURT RULES

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IN THE
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OCTOBER TERM, 1975

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MOTION FOR CERTIFICATION OF QUESTION OF LAW
TO THE NEW HAMPSHIRE SUPREME COURT
PURSUANT TO RULE 20
OF THE NEW HAMPSHIRE SUPREME COURT RULES

NOW COME the Petitioners, Ernest F. Mitchell, Jr., and Rose L. Mitchell, in the above-entitled Petition for a Writ of Certiorari and, without waiving any matters set forth in the Petition for Certiorari, respectfully move that the Supreme Court of the United States certify to the New Hampshire Supreme Court under Rule 20 of the Rules of the New Hampshire Supreme Court the question of law of whether the decision of the Court of Appeals for the First Circuit reported in Fed. 2d , (1976) conflicts with the law of the State of New Hampshire on the burden of proof and sufficiency of the evidence to justify a jury verdict, said certification order to be substantially in accordance with the proposed order attached hereto and marked "Appendix A"; and the Petitioners specifically assign as reasons for said Motion, the following:

1. The Court of Appeals for the First Circuit has reversed jury verdicts which were favorable to the Petitioners using its

own standard of the level of evidence necessary to justify the verdicts. Unquestionably, the standards of burden of proof and sufficiency of evidence under New Hampshire law would hold that the verdicts are justified.

2. The New Hampshire Supreme Court is willing to accept questions of law certified to it by the Supreme Court of the United States. The material portions of Rule 20 of the Rules of the Supreme Court of New Hampshire which outline the procedure for certification of questions of law are attached hereto and marked "Appendix B".

3. The Petitioners had filed a motion requesting that the Court of Appeals for the First Circuit certify to the New Hampshire Supreme Court the question of the state law relating to this case but the Court of Appeals denied the motion.

4. There should be no difficulty in the certification of the question of law and in the certification of the record to the New Hampshire Supreme Court for a decision on the relatively simple facts of this case.

5. Certification of the question of law to the New Hampshire Supreme Court will facilitate the disposition of the issues in this case and save important time for the Supreme Court of the United States.

6. After the certification order is made, counsel for the parties can file appropriate pleadings with the New Hampshire Supreme Court under the liberal New Hampshire procedures in order to provide the New Hampshire Court with appropriate records which either party may feel is necessary in answering the question certified.

7. A decision from the New Hampshire Supreme Court on the question of law in this case will clearly reveal the conflict between the law of the State of New Hampshire and the Federal law relative to the level of evidence needed to submit this case to a Jury.

8. Once the New Hampshire Supreme Court has ruled on the

question of law certified, the Supreme Court of the United States can then rule on the important Federal questions in this case, namely: (1) In diversity of citizenship cases, can the Federal Court apply its own principles of burden of proof and sufficiency of the evidence, or must the State standards relating thereto be applied; and (2) What weight should be given by the Court of Appeals as to interpretations of local law made by the District Court Judge.

Ernest F. Mitchell, Jr., and Rose L. Mitchell

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APPENDIX A

CERTIFICATION ORDER PURSUANT TO RULE 20 OF THE NEW HAMPSHIRE SUPREME COURT RULES

This case involves a Petition before the Supreme Court of the United States for a Writ of Certiorari to the Court of Appeals for the First Circuit in which an issue of the law of the State of New Hampshire has been raised which may be determinative of the case.

Diversity of citizenship civil jury cases were plead, proved and submitted to a Jury in the United States District Court for the District of New Hampshire involving a common law claim for damages for personal injuries because of the negligent design of a product. The Jury returned verdicts for the Petitioners, Mr. and Mrs. Mitchell. The Judge of the United States District Court for the District of New Hampshire approved the verdicts and denied various motions of the Respondent, Ford Motor Company. Ford Motor Company appealed to the United States Court f Appeals for the First Circuit. The Court of Appeals reversed and ordered judgment for the Respondent, Ford Motor Company. The opinion of the Court of Appeals is reported in F 2d (1976).

There do not appear to be any precedents in the decisions of the New Hampshire Supreme Court which would control the issue decided by the Court of Appeals for the First Circuit in this case.

The question certified is as follows:

Does the decision of the Court of Appeals for the First Circuit reported in F 2d (1976) conflict with the law of the State of New Hampshire on the burden of proof and the sufficiency of evidence to justify a jury verdict?

Counsel for Mr. and Mrs. Mitchell, the Petitioners, claims that the New Hampshire Supreme Court would rule that the evidence is sufficient to support the jury finding of liability.

Counsel has argued that the decision of the Court of Appeals is based on a ruling by the Court of Appeals that as a matter of law there had been neglect of maintenance of the product. Counsel has pointed out that although Mr. Mitchell testified that he was not aware of any repairs or adjustments to the handbrake in the truck during the year of his corporation's ownership of the truck before the accident, there was evidence that the brakes had been checked and inspected as required by State law. There was also evidence that the truck had been serviced by a Ford garage on at least two occasions and was regularly serviced by the foreman of Mr. Mitchell's company. Mr. Mitchell also testified that he did not encounter any problems with the brake before the accident. The Petitioners' experts testified that because the handbrake lever was shorter than the level of the driver's seat, application of the brake was awkward. The Petitioners' experts testified that the defective design resulting in awkward application of the handbrake caused Mr. Mitchell's inability to fully apply the brake in the circumstances of the accident which caused Mr. Mitchell's injuries. At the trial, by agreement of counsel, the jury was permitted to view the scene of the accident and the interior and exterior of the actual truck involved in the accident. Also, during the trial the jury viewed motion picture films of the application of the handbrake.

The Court of Appeals for the First Circuit has set forth in its opinion the facts upon which it relied in reaching its decision to reverse the judgment of the District Court. Further facts are found in the records of the trial which are on file with the Supreme Court of the United States.

Counsel for the parties shall file with the New Hampshire Supreme Court appropriate pleadings or stipulations in order to assist that Court in determining the portions of the records that may be necessary in answering the question certified. The records required by the New Hampshire Supreme Court will be filed with that Court with this certification order.

APPENDIX B

NEW HAMPSHIRE SUPREME COURT RULES, RULE 20

"20. This court may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, or of the District of Columbia, or a United States district court when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

This rule may be invoked by an order of any of the courts referred to in paragraph 1 upon that court's own motion or upon the motion of any party to the cause.

A certification order shall set forth

(1) the questions of law to be answered; and

(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

The certification orders shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to this court by the clerk of the certifying court under its official seal. This court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of this court, the record or portion thereof may be necessary in answering the questions.

Fees and costs shall be the same as in civil appeals docketed before this court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

Proceedings in this court shall be those provided in these rules or statutes governing briefs and arguments.

The written opinion of this court stating the law governing the questions certified shall be sent by the clerk under the seal of this court to the certifying court and to the parties . . ."

" . . .This rule shall be so construed as to effectuate its general purpose to make uniform the law of those states which adopt it; or enact a uniform certification statute.

This rule may be cited as the Uniform Certification of Questions of Law Rule."

Supreme Court, U. S.
FILED
JUL 21 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1832

ERNEST F. MITCHELL, JR. AND
ROSE L. MITCHELL,
PETITIONERS,

v.

FORD MOTOR COMPANY, A Corporation,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION FOR CERTIFICATION TO THE NEW HAMPSHIRE SUPREME COURT

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1832

ERNEST F. MITCHELL, JR. AND
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PETITIONERS,

v.

FORD MOTOR COMPANY, A Corporation,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION FOR CERTIFICATION TO THE NEW HAMPSHIRE SUPREME COURT

Statement of the Case

Plaintiff Ernest Mitchell, a small contractor who operated his own construction firm in Laconia, New Hampshire, purchased a used 5½ ton dump truck manufactured and originally sold by the defendant Ford Motor Company. The truck was purchased by the plaintiff when it was a few months old and had been driven about 5,000 miles. In the approximately one year that elapsed from the purchase of the truck until the date of the accident, the plain-

tiff and his employees put another approximately 20,000 miles on the truck. The plaintiff drove the truck regularly and always used the handbrake when parking it. Plaintiff testified that, to his knowledge, during the entire period that he owned the truck prior to the accident "no adjustments or repairs of any type had been made to that handbrake".

On the day in question, while backing the truck down a slight incline to connect with a trailer, plaintiff accidentally struck the trailer and started it down the incline. He stopped the truck, took the motor out of gear, pulled on the handbrake, left the truck and pursued the trailer. The brake did not hold, and the truck backed over the plaintiff, causing him bodily injuries. The brake would have held if it had been fully applied.

Plaintiff Ernest Mitchell was 5′ 4″ tall and, accordingly, drove the truck with the seat all the way forward. Because brake wear had increased the brake lever's "travel", the lever would have come to within approximately 3 inches of the seat in the forward position if it had been fully applied at the time of the accident. Plaintiff's experts testified that the lever's shortness made full application of the brake under these circumstances awkward, especially if the user employed a particular grip or grasp. The experts also opined that a proper design would have provided a longer lever to clear the top of the seat.

As manufactured, the lever did not come close to the seat and performed its function in permitting brake application with no difficulty. Anticipating brake wear, the defendant had incorporated into its design a compensatory adjustment which would reduce the lever's travel. After the accident, one of the plaintiff's own experts made just such an adjustment. The entire process took but minutes and, according to the plaintiff's expert, made the brake "safe".

The plaintiffs brought a diversity suit in the United States District Court for the District of New Hampshire alleging negligent design of the truck brake system. A trial by jury resulted in a verdict for the plaintiff Ernest Mitchell for his personal injuries and for the plaintiff Rose Mitchell for loss of consortium. Motions by the defendant for a directed verdict and for judgment notwithstanding the verdict were denied by the Trial Court. On appeal, the Court of Appeals for the First Circuit reversed and entered judgment for the defendant on the grounds that the plaintiffs had failed to present evidence sufficient to sustain a jury verdict that the truck and handbrake system had been negligently designed by the defendant (Appendix A). The plaintiffs' petition for rehearing and motion for reconsideration were both denied by the Court of Appeals (Appendices B-F).

The plaintiffs now seek review of the decisions of the Court of Appeals by way of writ of certiorari. Plaintiffs also request that certain questions regarding the law of the State of New Hampshire concerning burden of proof and sufficiency of the evidence to withstand a motion for directed verdict be certified to the New Hampshire Supreme Court. The defendant opposes both the petition for writ of certiorari and the motion for certification.

Reasons for Refusing the Writ of Certiorari and for Denying the Motion for Certification

I. The Petition for Writ of Certiorari Should Be Denied Because the Issues Now Argued by the Plaintiffs Were Not Raised or Decided Below and No Substantial Federal Question Is Therefore Adequately Presented for Review.

The plaintiff's contention that the Court of Appeals applied standards as to the burden of proof and sufficiency

of the evidence different from those utilized by the courts of the State of New Hampshire is not substantiated by the record below.

The decision of the Court of Appeals of March 29, 1976 expressly acknowledges in the first sentence that "This is a diversity action brought in the District Court for the District of New Hampshire". Nowhere in that opinion did the Court articulate or even intimate that it was applying substantive or procedural law other than that of New Hampshire. On the contrary, the Court cited two New Hampshire product liability cases in support of its holding: *Murray* v. *Bullard Co.*, 110 N.H. 220, 265 A.2d 309 (1970) and *McLaughlin* v. *Sears, Roebuck & Co.*, 111 N.H. 265, 281 A.2d 587 (1971).

The plaintiffs first raised their present complaint concerning the standard to be applied in determining the sufficiency of evidence in their petition for rehearing. See para. 12, Petition for Rehearing, Appendix B. In its order of April 26, 1976 denying the petition, the Court of Appeals made no mention whatsoever of that issue. Indeed, the plaintiffs themselves acknowledged this fact in their moion for reconsideration wherein they complained that "This Court did not consider the constitutional issues raised in the Petition for Rehearing . . . ." See para. 6, Motion for Reconsideration, Appendix E.

The only reference in any of the opinions and orders of the Court of Appeals to the issues presented by the instant petition for writ of certiorari appear in a single sentence of the Court's May 4, 1976 order denying plaintiffs' motion for reconsideration:

> Plaintiff's claim that he was unconstitutionally deprived of a jury trial, taken at its face value, would mean that a verdict could never be directed.

The Court did not purport in that remark to address itself to the particular standards established by the law of New Hampshire for determining the sufficiency of evidence. Quite clearly, the Court was merely responding to the plaintiffs' suggestion that the Seventh and Fourteenth Amendments to the Constitution of the United States prohibited the direction of a verdict in *any* civil case tried by jury.

At no point in the proceedings below did the plaintiffs contend — as they do now — that the Court of Appeals shifted the burden of proof in contradiction to the law of the State of New Hampshire. Likewise, the defendant in its brief on appeal never urged the Court to apply any other law as to burden of proof than that of New Hampshire. Quite understandably, therefore, the Court of Appeals did not mention that issue in any of its opinions or orders.

Also advanced for the first time in their petition for writ of certiorari is the plaintiffs' contention that the Court of Appeals disregarded decisions of the Trial Court concerning the local law of New Hampshire. Presumably, the plaintiffs refer to the Trial Court's denial of the defendant's motions for directed verdict and for judgment notwithstanding the verdict. In reversing the Trial Court and entering judgment for the defendant, however, the Court of Appeals merely exercised its admitted appellate power to review issues of law. See, *e.g.*, *Dumas* v. *MacLean*, 404 F.2d 1062 (1st Cir. 1968); *Hobart* v. *O'Brien*, 243 F.2d 735 (1st Cir.), *cert. den.*, 355 U.S. 830 (1957). In so doing, the Court of Appeals did not purport to ignore New Hampshire law or the Trial Court's interpretation thereof; it merely determined that the Trial Court had misapplied the law of New Hampshire with respect to the facts of this case.

Issues which were not raised in the lower courts will not be entertained by the Supreme Court when presented initially in a petition for writ of certiorari. *McCullough* v. *Kammerer Corporation,* 323 U.S. 327, 65 S.Ct. 297, 89 L.Ed. 273 (1945); *Helvering* v. *Minnesota Tea Company,* 296 U.S. 378, 56 S.Ct. 269, 80 L.Ed. 284 (1935). Similarly, Supreme Court review will be declined where the issues presented by the petition have not been addressed by the lower courts with sufficient clarity and directness for the Court to be assured that a substantial federal question in fact exists. *Ellis* v. *Dixon,* 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231 (1955); *Rescue Army* v. *Municipal Court of the City of Los Angeles,* 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947).

In the case at bar, the record below fails to provide an adequate vehicle for the Supreme Court to appropriately exercise its power of review. The plaintiffs request this Court to further define *Eire's* delicate balance of state and federal law as applied in diversity cases on the basis of the plaintiffs' own unsupported assertions and speculations concerning the *ratio decidendi* of the opinions of the Court of Appeals below. From all indications in the record, however, the Court of Appeals purported to do precisely what the plaintiffs argue for: to apply the law of the State of New Hampshire. *See also, e.g., Wilson* v. *Nooter Corporation,* 475 F.2d 497 (1st Cir. 1973), *cert. den.,* 414 U.S. 865 (1973); *Cross* v. *M. C. Carlisle & Co.,* 368 F.2d 947 (1st Cir. 1966). In the absence of a clear statement from the Court of Appeals that it applied some articulated federal standard different from the law of New Hampshire, the Supreme Court should decline the plaintiffs' invitation to issue a gratuitous opinion in this area.

II. The Petition for Writ of Certiorari and the Motion for Certification Should Be Denied Because the Law Actually Applied by the Court of Appeals in This Case Is the Same as the Law of the State of New Hampshire and No Substantial Federal Question Is Presented for Review.

Under New Hampshire law, a verdict may be, but seldom is, directed *in favor* of a party who has the burden of proof. *Boothby* v. *Prescott,* 97 N.H. 504, 92 A.2d 661 (1952). *See also, Wright* v. *Connecticut Valley Electric Co.,* 106 N.H. 113, 206 A.2d 103 (1964). The Court of Appeals for the First Circuit has expressly acknowledged this proposition of New Hampshire law and has applied it in another diversity case to reverse the District Court's direction of a verdict in behalf of a plaintiff who had the burden of proof. *Wilson* v. *Nooter Corporation,* 475 F.2d 497 (1st Cir. 1973), *cert. den.,* 414 U.S. 865 (1973). *See also, Service Auto Supply Co. of Puerto Rico* v. *Harte & Company, Inc.,* 533 F.2d 23 (1st Cir. 1976).

On the other hand, New Hampshire law clearly authorizes the direction of a verdict *against* a party having the burden of proof. *E.g., Hadler* v. *Great Eastern Life Insurance Co.,* 109 N.H. 453, 256 A.2d 650 (1969). In ruling upon a motion for directed verdict, the courts of New Hampshire are required to construe "the evidence and all reasonable inferences therefrom" most favorably to the party having the burden of proof. *E.g., Dubreuil* v. *Dubreuil,* 107 N.H. 519, 229 A.2d 338 (1967). Evidence which is undisputed, but which is adverse to the party carrying the burden of proof, must, however, be included in the court's consideration of the motion. *E.g., Moore* v. *Phoenix Fire Insurance Co.,* 64 N.H. 140, 6 Atl. 27 (1886).

The test applied by the First Circuit to determine the sufficiency of the evidence with respect to the direction of a verdict against a proponent is precisely the same as that articulated in the case law of New Hampshire:

> The evidence must be viewed in the light most favorable to [the party bearing the burden of proof], giving him the benefit of every favorable inference that may be fairly drawn.

Dumas v. *MacLean,* 404 F.2d 1062, 1064 (1st Cir. 1968) (N.H. diversity case). *Accord, Cross* v. *M. C. Carlisle & Co.,* 368 F.2d 947, 953 (1st Cir. 1966) (N.H. diversity case). Contrary to the assertion by plaintiffs in their petition, the statement by the First Circuit in a recent Massachusetts diversity case, *Molinar* v. *Western Electric Company,* 525 F.2d 521 at 523 (1st Cir. 1975), *cert. den.,* 96 S.Ct. 1485 (1976), that it does not neglect "the uncontradicted evidence introduced by defendants" directly comports with the law and practice of the Courts of New Hampshire.

The contention in plaintiffs' petition that the case of *Carlson* v. *American Safety Equipment Corporation,* 528 F.2d 384 (1st Cir. 1976) reveals the application by the First Circut in diversity cases of some federal standard imposing a burden of proof upon a plaintiff to show himself free of contributory negligence completely misconstrues the holding of that case. In stating that "it is incumbent on the plaintiff to show that the instrumentality had not been improperly handled by [plaintiff] or by intermediate handlers", the Court was addressing itself not to the issue of contributory negligence, but to a plaintiff's special burden under the doctrine of *res ipsa loquitur* to prove that an instrumentality had been under the exclusive control of the defendant or had not been altered since it left the defendant's control. Moreover, the Court's express citation of Massachusetts authorities in support of its holding makes it apparent that the standard of proof enunciated by the Court in that case was not — as the plaintiffs herein imply — a federal standard.

The plaintiffs' entire argument in their petition concerning New Hampshire law on burden of proof and sufficiency of the evidence likewise misapprehends the decision of the Court of Appeals in this case. Contrary to the plaintiffs' fundamental assumption that the instant case was reversed on the grounds of the plaintiff Ernest Mitchell's contributory negligence, the Court of Appeals held that the *plaintiffs* had failed to sustain their burden of proof that the *defendant* had negligently designed and sold a defective product.

No one challenges the plaintiffs' contention that New Hampshire law places the burden of proof of contributory negligence upon the defendant. New Hampshire RSA 507:7-a. But the Court of Appeals in this case never reached the issue of contributory negligence. As the Court stated, "The sole issue we reach is whether there was evidence to support the jury finding of liability." On that issue, the plaintiffs have the burden of proof in New Hampshire. *Ibid.*

The holding of the Court of Appeals below was that the handbrake system on the plaintiff's truck had not been negligently designed by the defendant since its potential for danger only came into existence after substantial use caused it to noticeably wear out and the defendant had incorporated into its design a simple adjustment mechanism to compensate for that wear. As stated by the Court, "a manufacturer is not under a duty to supply materials that will not wear out". This holding is in accord with the law of the State of New Hampshire. *McLaughlin* v. *Sears, Roebuck & Co.,* 111 N.H. 265, 281 A.2d 587 (1971); *Murray* v. *Bullard Co.,* 110 N.H. 220, 265 A.2d 309 (1970).

The few references in the opinion and orders of the Court of Appeals to the maintenance of the handbrake system prior to the accident and the condition of the

system at the time of the accident were not directed to the question of the plaintiff Ernest Mitchell's contributory negligence. The significance of the facts recited by the Court concerning the lack of adjustment of the handbrake over 20,000 miles of use and its location just three inches from the seat at the time of the accident were that they unequivocally demonstrated that the brake had worn and that the alleged interference between the brake handle and the driver's seat had been caused by use and not by the defendant's design. As stated by the Court in its May 4, 1976 order denying plaintiffs' motion for reconsideration, the holding of the case was not dependent upon whether or not Mr. Mitchell himself had detected the brake wear; the holding was that the defendant was not negligent merely for designing a product that would eventually change its condition after usage and wear.

Under New Hampshire's comparative negligence law, a plaintiff is only barred from recovery because of his own negligence if his negligence exceeded that of the defendant or, to state it another way, only if his negligence was fifty-one percent or more the cause of the accident. New Hampshire RSA 507:7-a. The complete absence of any mention in the Court of Appeals' opinions and orders below of this doctrine and its applicability to the facts of this case is perhaps the strongest indication that the Court of Appeals did not reverse the Trial Court on the grounds of the plaintiff Ernest Mitchell's contributory negligence.

The plaintiffs' motion to certify questions of law to the New Hampshire Supreme Court concerning burden of proof and the standard by which to determine the sufficiency of evidence upon a motion for directed verdict is unwarranted and inappropriate in this case. The plaintiffs do not seek a clarification of New Hampshire law, but a redetermination by yet another court of the application of that law to the facts of this case. As may be gleaned from the plaintiffs' petition for writ of certiorari and this response, there is in fact no disagreement between the parties as to the law of New Hampshire on burden of proof and sufficiency of the evidence. The present dispute concerns differing views of what the Court of Appeals decided and by what standard it reached its decision. The New Hampshire Supreme Court can offer no assistance in resolving that dispute.

A writ of certiorari should not be issued to review a lower court's interpretation of unique facts bearing upon the issues of causation and negligence in an ordinary civil case. *McAllister* v. *United States,* 348 U.S. 19, 23, 85 S.Ct. 6, 99 L.Ed. 20, 26 (1954) (separate opinion of Frankfurther, J.). Those "special and important reasons" which transcend the importance of a case to its parties and which justify granting the writ in cases of national significance do not exist in the case at bar. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Because the decision of the Court of Appeals below concerns only the application of the New Hampshire law of products liability to a unique and episodic factual situation, the petition should be denied.

Likewise, the plaintiffs' motion for certification to the Supreme Court of New Hampshire should also be denied. The certification procedure should be reserved for those cases involving significant, novel or ambiguous local law issues. *See, e.g. Bellotte* v. *Zayre Corporation,* 531 F.2d 1100 (1st Cir. 1976); *Bilodeau* v. *Oliver Stores,* 115 N.H. ——, —— A.2d —— (February 27, 1976). Additionally, when a motion to certify is made at the Supreme Court level, it should only be granted when the state law issue is essential to a review of the case and when the case itself otherwise warrants the issuance of a writ of certiorari.

The case at bar does not satisfy any of these criteria. The issues of law proposed by the plaintiffs to be certified are neither novel to New Hampshire nor of significance to the nation. More importantly, even if the New Hampshire Supreme Court were to respond that it would have decided the case differently from the Court of Appeals, the record from the Court of Appeals will not reveal whether such a difference would have resulted from the application of contrary rules of law — as the plaintiffs would contend — or only from an honest disagreement as to the application of the same law to the facts of this case. Such ambiguity does not yield an appropriate case for the granting of a writ of certiorari and should therefore also result in the denial of the motion to certify.

III. EVEN IF THE COURT OF APPEALS DID APPLY A FEDERAL STANDARD OF SUFFICIENCY OF THE EVIDENCE AND EVEN IF THAT STANDARD WAS DIFFERENT FROM THAT APPLIED BY THE STATE COURTS OF NEW HAMPSHIRE, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PREDOMINANT FEDERAL INTEREST IN THE UNIFORMITY OF ITS JURY TRIAL PROCEDURE DICTATES THE APPLICATION OF THE FEDERAL STANDARD.

As discussed above, a careful reading of the decision of the Court of Appeals clearly reveals that the Court reversed the jury's verdict on the grounds that there was insufficient evidence of the defendant's causal negligence, and not on the grounds that there was overwhelming evidence of the plaintiff's contributory negligence. The plaintiffs' contention that the Court of Appeals shifted the burden of proof of contributory negligence from the defendant to the plaintiffs in contradiction to the law of New Hampshire is therefore wholly without merit and no discussion of the impact of the *Eire* doctrine upon that

issue is required. *See generally, Palmer* v. *Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).

As also discussed above, the standard applied by the First Circuit Court of Appeals for judging the sufficiency of the evidence is identical to or at least substantially the same as that of New Hampshire; this case is therefore not an appropriate one for the Supreme Court's elucidation of the *Eire* doctrine in this area. See *Mercier* v. *Theriot,* 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964); *Dick* v. *New York Life Ins. Co.,* 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). Assuming *arguendo,* however, that the Court of Appeals did utilize a different standard from that of New Hampshire and that the differences between the federal and the New Hampshire standards could be ascertained from the record below, the *Eire* doctrine would not mandate the application of the State standard.

In a pre-*Eire* case, *Herron* v. *Southern Pacific Co.,* 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857 (1931), this Court held that a Federal Court in a diversity case could direct a verdict on the ground of a plaintiff's contributory negligence despite a state constitutional provision requiring submission of that issue to the jury in all cases. The viability of this decision after *Eire* was affirmed by the Court in *Byrd* v. *Blue Ridge Electric Co-op,* 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958).

Although the issue of the sufficiency of the evidence to withstand a directed verdict is quite similar to that addressed by this Court in *Herron,* this Court has not expressly determined whether a Federal or State standard is applicable in diversity cases. Several of the Circuit Courts of Appeals, however, have reached this issue and the better reasoned decisions have applied a Federal rule. *E.g., Wratchford* v. *S. J. Grove & Sons,* 405 F.2d 1061 (5th Cir. 1969); *Safeway Stores* v. *Fannan,* 308 F.2d 94 (9th Cir. 1962). *See also,* 5 MOORE'S FEDERAL PRACTICE

§38.10, pp. 107-108 (1976); Wright, HANDBOOK ON THE LAW OF FEDERAL COURTS §92, pp. 403-4 (2d ed. 1970).

In a case such as the present one, the issue of sufficiency of the evidence is not integrally related to the substantive rights asserted by the parties; the present case is merely a common law negligence action which shares the standard for judging sufficiency of the evidence with all other civil actions. No substantial State interest peculiar to negligence actions inheres in the New Hampshire rules on sufficiency of the evidence.

A substantial Federal interest, however, in uniformity and consistency within its system has consistently been recognized in diversity cases dealing with the distribution of trial functions between judge and jury. *E.g., Simler* v. *Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963).

The primacy of the Federal interest over competing State considerations with particular respect to standards for determining the sufficiency of evidence has best been stated by Chief Justice Haynsworth of the Fourth Circuit,

> In a diversity case, state law defining and limiting those primary rights and obligations must be applied under the *Eire* doctrine, enabling members of society prudently to plan and conduct their affairs, whether their conduct will later be called into question in a state or federal court. A choice of a rule as to the quantum of proof necessary to support the submission of a case to a jury plays no role in the ordering of the affairs of anyone. It is not the kind of rule which must inexorably find its governance in a diversity case in the corpus of state law. Indeed, unless one accepts the "outcome — determinative" test as both inflexible and universal, there is little in this situation to support the choice of the state rule as opposed to the federal.

Wratchford v. *S. J. Groves & Sons Company, supra,* at 1065-6.

Even assuming, therefore, that in this case the Court of Appeals applied a federal standard of sufficiency of the evidence and that such standard was different from that of New Hampshire, the absence of any compelling New Hampshire interest inherent in its substantive law of negligence would mandate the application of the Federal standard. Consequently, the writ should be denied.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari and the Motion for Certification to the New Hampshire Supreme Court should be denied.

Respectfully submitted,

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July 14, 1976

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,

PLAINTIFFS, APPELLEES,

v.

FORD MOTOR COMPANY,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
(HON. HUGH H. BOWNES, *U.S. District Judge*)

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.

Eugene M. Van Loan, III, with whom *Wadleigh, Starr, Peters, Dunn & Kohls* was on brief, for appellant.

David J. Killkelley, with whom *Nighswander, Lord, Martin & Killkelley* was on brief, for appellees.

March 29, 1976

ALDRICH, *Senior Circuit Judge*. This is a diversity action brought in the District Court for the District of New Hampshire against a manufacturer for personal injury allegedly due to a defectively designed brake lever (handle) on a dump truck. The sole issue we reach is whether there was evidence to support the jury finding of liability.

On plaintiff's evidence plaintiff, a contractor, purchased the truck when it was a few months old, and had been driven about 5,000 miles. Approximately one year and

20,000 miles later, the accident occurred. Plaintiff was not the sole user of the truck, but he drove it regularly. On the day in question, while backing down a slight incline to connect with a trailer, he accidentally struck the trailer and started it down the incline. He stopped the truck, took the motor out of gear, pulled on the handbrake, left the truck, and pursued the trailer. The brake did not hold, and the truck backed over him. The brake would have held if it had been fully applied.

Plaintiff was 5′ 4″ tall and, accordingly, drove the truck with the seat all the way forward. Because of brake wear, which increased the lever's "travel," if fully applied at the time of the accident the lever would have come to within three inches of the seat in the forward position. Plaintiff's experts testified that, because of its shortness this made application awkward, especially if the user employed a particular grip or grasp, and that, in their opinion, a proper design would have provided a longer lever to clear the top of the seat. Although defendant asserted a reason for the supplied length, we accept plaintiff's experts' opinion, but subject to other established factors which have a bearing on the ultimate conclusion.

As manufactured, the lever did not come close to the seat. Anticipating wear, defendant had provided a compensatory adjustment. After the accident such an adjustment was made. It took but minutes. While not, of course, determinative, there was no affirmative evidence that defendant was ever aware of a handle problem.[1]

Before addressing basic principles, we must fault plaintiff's brief in two particulars. First, it says that the defect

[1] Defendant offered to show, negatively, that it had sold this truck in large numbers for a period of years without any claim on the design of the lever. Plaintiff objected, saying it was highly prejudicial, and that the rule allowing evidence of prior accidents "does not work in the negative." The court agreed. We need not reach this question, but note *Menard* v. *Cashman*, 1945, 93 N.H. 273, 274; *Pittman* v. *Littlefield*, 1 Cir., 1971, 438 F.2d 659, 662.

was not obvious. Secondly, it says plaintiff should not have to "continuously make an adjustment to the brake to fit his height" "every time (he) uses the truck." These are patent attempts to shift the facts to avoid the issues. Of course the defect—if it was a defect—was obvious. There was no suggestion that anything had gone suddenly wrong. Brake wear is gradual, and in the case of the handle's changed position, perceptible. We refrain from answering plaintiff's brief's other contention, that a condition that developed during 25,000 miles and had never been corrected, would require adjustment "every time he uses the truck."

Even the strict admiralty doctrine of unseaworthiness—liability without fault—does not require perfection. *See Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550; *Doucette* v. *Vincent*, 1 Cir., 1952, 194 F.2d 834, 837-38. There is probably little that could not be improved, or, at least, that some person having sufficient qualifications to be called an expert would not say could have been improved, selecting, after the event, which design would have been better. That, however, is not the test. As the court said in *Weakley* v. *Fischbach & Moore, Inc.*, 5 Cir., 1975, 515 F.2d 1260, at 1267-1268,

> "[Plaintiffs] rely principally on an attempted showing that there were design alternatives which, had they been adopted, would have prevented the accident or minimized its consequences. Such a showing, by itself, is insufficient to establish liability . . . It is one thing to show that the defendant might have designed a safer product; quite another to show that the product he did design was unreasonably dangerous. The defendant is not obliged to design the safest possible product, or one as safe as others make or a safer product than the one he has designed, so long as the design he has adopted is reasonably safe. W. Prosser, The Law of Torts § 96 at 645 (4th ed. 1971)."

In *Brown* v. *General Motors Corp.*, 4 Cir., 1966, 355 F.2d 814, at 820, cert. denied, 386 U.S. 1036, the court said,

> "Failure to adopt the most modern, or even a better safeguard, did not render the manufacturer liable to the injured mechanic . . . There is no indication in the evidence that the shield was not at least a reasonable preventive of injury."

Brown was cited with approval by the New Hampshire court in *Murray* v. *Bullard Co.*, post.

To come to specifics, a manufacturer is not under a duty to supply materials that will not wear out. *McLaughlin* v. *Sears, Roebuck & Co.*, 1971, 111 N.H. 265, 268; 281 A.2d 587, 589. There the court said,

> "The duty of the manufacturer or supplier is limited to foreseeing the probable results of the normal use of the product or a use that can reasonably be anticipated. Prosser, Torts 667 (3d ed. 1964); . . . Clearly there is no duty to furnish a product that will not wear out."

Plaintiff points out that an expert witness, called by defendant, testified that he "wouldn't think he'd make any adjustments unless it found it non-functional." This is not only contrary to defendant's operating manual's instructions to check brakes, but is contrary to common sense. An emergency brake that must fail before attention is to be given it, by hypothesis cannot be depended upon in an emergency. Nor is this the law. The user of a mechanism that is known to be subject to wear must do more than simply repair it after it fails. The contrary opinion of some witness, even though he may qualify as an expert, does not change the result; questions of law are for the court. The law is that a manufacturer does not have to anticipate that maintenance will be neglected. In *Murray* v. *Bullard Co.*, 1970, 110 N.H. 220, 225; 265 A.2d 309, 313, the court approved the principle that defendant "is not

liable where 'injury results from a failure to keep the manufactured product in good working order.' "

As was said in *Kaczmarek* v. *Mesta Mach. Co.*, 3 Cir., 1972, 463 F.2d 675, at 678,

> "Common sense dictates that there should be frequent if not periodic inspections and replacement of the worn parts as soon as they are detected."

Plaintiff's own expert testified,

> "[T]he adjustment should be checked periodically; . . . you are put on the alert for changing the adjustment if you find it is getting too loose or that the handle is coming back too far." (R. 194).

Instead, plaintiff is claiming that a dump truck's brake assembly should be so perfect that he should not be required to maintain it, or make use of the adjustment feature provided, even though the wear was apparent, and that after 25,000 miles it should work as it did at the beginning.

Product liability in the individual case is paid for by the manufacturer, or its insurer, but in the long run whatever standard has to be met is reflected in the cost of the product. A standard that would permit an owner to neglect wear which is expectable and apparent, not to mention easily remediable by a design provision, imposes altogether too high a burden.

Reversed. Judgment for the defendant.[2]

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[2] In fairness to the district court, since no case cited in this opinion, except one in the footnote, was furnished us by the defendant, presumably none was to it. Where the verdict runs into six figures we believe courts have a right to expect a modicum of diligence on the part of counsel.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,

PLAINTIFFS, APPELLEES,

v.

FORD MOTOR COMPANY,

DEFENDANT, APPELLANT.

PETITION FOR REHEARING

Introductory statement pursuant to Rule 15 of the Rules of the United States Court of Appeals for the First Circuit: The arguments and matter set forth in this Petition for Rehearing were not presented to the Court before because the Defendant, Ford Motor Company, never presented to the Trial Court or the Appellate Court the reasoning stated in the Court's opinion, the Plaintiffs did not anticipate that this Court would misconstrue the Plaintiffs' argument, the Plaintiffs were not aware until the Court's decision that there was to be any claim that the defect or dangerous condition of the product was obvious as a matter of law, and the Plaintiffs were not on notice of the misapprehension of the facts and the misapprehension of the points of law as stated herein below until the Circuit Court's decision.

The Plaintiffs in the above-entitled matter respectfully petition for a rehearing and they specifically assign as reasons therefor the following:

1. In its decision, the Circuit Court appears to state that the Plaintiff, Ernest F. Mitchell, Jr., was the owner

of the truck involved in the accident. On the contrary, the evidence showed that the truck was owned by Mitch's Construction Company, Inc. Mr. Mitchell testified that he purchased the truck for the business (R. 282) which was called Mitch's Construction Company, Inc., a corporation. (R. 281 and Exhibit 13 including corporate income tax returns).

2. In its decision, the Circuit Court claims at page 2 that Ernest F. Mitchell, Jr. used the truck in question "regularly". The extent of use made by Mr. Mitchell of the truck was clearly a jury issue. Mr. Mitchell testified he used the truck "quite often" and "numerous times". (R. 320). It was a question of fact as to whether Mr. Mitchell used the truck regularly or irregularly. The Court should not have held that as a matter of law the Plaintiff used the truck "regularly".

3. At page 3 of its decision, this court claims:

> "... if fully applied at the time of the accident the ... (brake) ... lever would have come to within three inches of the seat in the forward position."

This is not correct. The only measurement given for this distance was the measurement determined by Mr. Cromwell in March of *1974* as shown on Plaintiffs' Exhibit 27 attached as Appendix to Plaintiffs' Brief. The accident occurred on June 15, *1973*. The jury could conclude that the distance may have been more. This was a question of fact and this Court should not have concluded as a matter of law that the lever was three inches from the seat at the time of the accident.

4. At page 3 of this Court's opinion the Court claims:

> "As manufactured, the lever did not come close to the seat."

This statement is not correct. The brake lever was improperly *located* close to the seat "far reaching to the right." The jury had the opportunity to view the truck,

the brake's location, and to accept the following testimony of Mr. Cromwell, Plaintiffs' expert:

> "I ... found that the parking brake handle was so short that it did not extend above the level of the seat upon which the operator sits. It was in such a position, far reaching to the right, and low to the seat, that it was extremely difficult to put this brake on to a point that would assure the operator that it was securely fastened. As you pull the brake rearward, the mechanical advantage is so poor because your arm has to come up and you put a component on the brake handle of pulling it off of the floor, really almost as much as you have pulling it to the rear. It is an extremely difficult situation. I would consider it dangerous." (R. 362).

The brake lever was improperly located in the truck close to the seat as manufactured. The jury could easily come to this conclusion. The Appellate Court should not have concluded otherwise.

5. At page 3 of its opinion, this Court claims:

> "Anticipating wear, Defendant had provided a compensatory adjustment." Ford *never* claimed that the adjustment feature in the emergency brake system was for the purpose of protecting the driver from seat interference in the application of the emergency brake. This common adjustment feature is provided for the proper *functioning* of the brake. Ford's supervisor of design analysis admitted this. Ford *never* claimed otherwise in any of the testimony in this case. Ford *never* claimed the adjustment feature was to be used to compensate for a defect in the design of the height and location of the brake lever.

6. This Court ruled as a matter of law that:

> "The defect ... was obvious." (Page 4 of the opinion).

In the District Court, the Trial Judge and the jurors had the opportunity to observe the witnesses who testified and their demeanor. They had the opportunity to view motion picture films of the application of the brake in this type of truck and the location of the brake in relation to the seat and how it is applied. (Defendant's Exhibit 34 for Identification). Indeed, at the view the jurors had the opportunity to examine the *actual truck* involved in this accident. They viewed the brake handle, the brake lever, and the seat. They were able to determine the emergency brake's relation to the seat. The jurors, representing a true cross-section of the community, applied their common experience to all of this evidence. The conclusion is inescapable that the seat interference with the proper application of the brake was *not* open and obvious. The supervisor of design analysis for Ford Motor Company (R. 518) claimed that there was not seat interference. (R. 424). There was admitted in evidence, a series of photographs taken, and the motion picture films, all presented by Ford claiming there was no seat interference in the application of the brake. See Plaintiffs' Exhibit 30 (1-33) consisting of 33 photographs presented by Ford. Also, the motion picture film, Defendant's Exhibit 34 for Identification. The record in this case does not in any way justify a ruling as a matter of law that the dangerous condition caused by the defect in the design of the hand brake was obvious to the ordinary person. The supervisor of design analysis for Ford testified that there were no "problems with seat interference . . . with the seat in the fully forward position." (R. 424). Ford, therefore, continually denied there was a defect or any dangerous condition. If the supervisor of design analysis from Ford Motor Company says that he sees no dangerous condition, then it certainly is at least a jury issue as to whether the dangerous condition is apparent to the ordinary person. As part of its ruling that the defect was obvious, this Court

has ruled as a matter of law that the brake ". . . handles changed position . . . (is) . . . imperceptible." (Page 4 of the opinion). This is not correct. When the brake is adjusted in its original adjustment, the brake goes to the fourth (4th) or fifth (5th) tooth of the pawl when the brake is in its applied position. (R. 639). There are thirteen (13) teeth on the pawl. (R. 185, 638 and 639). Photographs were taken when Mr. Edelen, Ford's expert, made his inspection of the truck in October of 1974. (R. 521). The jury could conclude that the brake was in the same condition of adjustment in October of 1974 as it was in June of 1973 at the time of the accident. Compare photographs, Plaintiffs' Exhibit 30 (1-33) with Plaintiffs' Exhibit 8-C. Yet, Mr. Edelen found the brake to be in the *sixth* (*6*) tooth of the pawl in its applied position at the time of his inspection of the truck. (R. 639). Mr. Carroll, who examined the truck within a month after the accident, testified as follows on cross-examination:

> "Now, when you normally apply this brake, when a person normally applies it, he would go back to have it in a full position, would you say, half way, the fifth or sixth tooth, seventh tooth, in that area?
>
> A. Approximately, yes."

(R. 185). The jury could easily conclude that the brake was in the sixth (6th) tooth on the pawl at the time of the accident. It is most unfair for the Appellate Court to conclude as a matter of law that the "travel" of the brake handle from the fourth (4th) tooth to the sixth (6th) tooth on a pawl of thirteen (13) teeth is "perceptible." Common everyday experience would lead an ordinary person to conclude otherwise. The issue of the openness and obviousness of the defect or dangerous condition was at the very least a jury issue.

7. On page 4 of this Court's opinion, this Court states: "There was no suggestion that anything had gone suddenly wrong."

On the contrary, the Plaintiffs' claim, through their experts, was based on the fact that the brake could not be properly applied in an *emergency* situation. In this case there was a sudden inability to fully apply the brake in an emergency because of the combination of the improper location and height of the lever. The improper application of the emergency brake in an *emergency* was argued throughout the Plaintiffs' Brief, see particularly page 44 of Plaintiffs' Brief. There was no evidence that Mr. Mitchell had ever had any need to previously apply the emergency brake in a sudden emergency. The interference with the brake's proper application created an active dangerous condition only when the brake had to be applied in an emergency or sudden stress situation. This claim of the Plaintiffs was advanced in both experts' reconstruction of this accident. An emergency brake which cannot be applied properly cannot be depended upon in an emergency. The Plaintiffs' case was based on the sudden manifestation of the defect in the design of the brake because o fthe emergency. The Court overlooked this part of the Plaintiffs' argument and evidence.

8. On page 4 of this Court's opinion, it is stated:

> "We refrain from answering Plaintiffs' Brief's other contention, that a condition that developed during 25,000 miles and had never been corrected would require adjustment 'every time he uses the truck'."

The Court has misconstrued the Plaintiffs' argument. Plaintiffs did *not* contend in their Brief that the "condition" of the brake would require adjustment every time the driver uses the truck. The Plaintiffs' Brief reveals that the Plaintiffs claimed in their Brief that the manufacturer could not expect constant adjustments to the brake. See Plaintiffs' Brief, page 6, wherein it is stated:

> "Relying on constant adjustment of the brake . . . to keep it in its original tight adjustment without allowing any 'travel' of the brake handle certainly is not justified."

The supervisor of design analysis for Ford agreed that one would expect that the seat in the cab of the truck would be adjusted to fit the driver's height every time a person uses the truck but constant adjustment is not expected relative to the riser under the seat or the brake adjustment feature. (R. 610 and 611). Plaintiffs' Brief, page 7. The adjustments made to the emergency brake by a mechanic are determined by considerations of keeping the brake functional. Furthermore, the Plaintiffs *never* contended that any "condition" developed during 25,000 miles. Nor that the "condition" had "never been corrected." In the Court's opinion at pages 8 and 9, the Court states:

> ". . . Plaintiff is claiming that a dump truck's brake assembly should be so perfect that he should not be required to maintain it, or make use of the adjustment feature provided, even though the wear was apparent, and that after 25,000 miles it should work as it did in the beginning".

The Plaintiffs *never* made these claims. The Court is ruling as a matter of law that: (a) Mr. Mitchell did not properly maintain the truck; (b) he did not make use of the adjustment feature; (c) wear was apparent; and, (d) the brake wore for 25,000 miles. On the contrary, there was more than adequate evidence in this case from which a jury could conclude that the truck *was* properly maintained, the adjustment feature was reasonably utilized, the "wear", if there was any wear, was not apparent and the brake lining did not wear during 25,000 miles of use. Mr. Mitchell had used the emergency brake when he used the truck by the Company had as many as four other employees. (R. 281). Obviously, it is not the amount of mileage traveled but the number of times and the manner of application which determines the amount of wear of

the brake lining. It would be reasonable for the jury to conclude that Mr. Mitchell's use of the truck may have only been ten or twenty percent of the time, in other words, approximately 2,000 to 4,000 miles. Mr. Boynton, the foreman of Mitch's Construction Company, Inc., usually used the truck in question. He testified that he *didn't use* the emergency brake. (R. 72). The jury could conclude that the brake lining did not wear to any degree during the use of the truck before the accident. It is unfair for the Appellate Court to conclude otherwise as a matter of law. Also, the jury could have concluded certainly that any wear of the lining was not apparent to the ordinary person. The change of the brake from the fourth (4th) tooth to the sixth (6th) tooth on the pawl is so minimal that it is manifestly unfair to conclude that such "wear" is "apparent" as a matter of law. Furthermore, there was abundant evidence in this case from which a jury could definitely conclude that the brake assembly of the truck involved in the accident *was* properly maintained and reasonable use made of the adjustment feature. Mr. Warren Boynton, foreman of Mitch's Construction Company, Inc., was in charge of general maintenance of equipment. (R. 329). Although Mr. Mitchell stated that he had no "knowledge" of adjustments or repairs to the brake, he did state that he had the truck inspected as required by the State and that when that was done, the garage would ". . . check everything. They would check the brakes, the whole works . . ." If they found something wrong:

> "They either repair it or they don't put a sticker on it." (R. 329).

From this testimony the jury could certainly conclude that Mitch's Construction Company, Inc. had reasonable maintenance done to the truck including full checking of the brake assembly at least semi-annually. The jury could conclude that this conformed to the standard of care of

the ordinary prudent truck owner. *In addition,* before the accident the truck had been taken to Genest Ford Garage on at least two occasions for warranty servicing. (R. 71). It is reasonable to assume that Ford's dealer checked the brake assembly and properly performed maintenance when the truck was at its garage. It is, therefore, most unfair for this Court to now conclude that the truck or the brake assembly was not properly maintained. Also, Mr. Boynton performed minor servicing on the truck, (R. 71), to keep it in proper condition. Under all these circumstances, it would be perfectly reasonable for the jury to conclude that Mitch's Construction Company, Inc. did properly maintain the truck in accordance with what an ordinary truck owner would do under the circumstances.

9. It appears that this Court has ruled as a matter of law that the manufacturer is not liable because it should not have to anticipate the circumstances of this accident. Such a decision misapprehends the facts and the law. The instant case involves the failure of the manufacturer to use due care in the design of a product. There is absolutely no question that the manufacturer should have anticipated that this Ford truck would be used in an emergency situation with the seat in its most forward position and the brake lever at approximately the sixth (6th) tooth on the brake pawl. Ford never claimed otherwise. It is contrary to all legal principles for this Court to rule as a matter of law that the manufacturer could not reasonably anticipate such a situation.

10. The reasons set forth in this Court's opinion were never advanced by Ford in the District Court. This was pointed out on page 20 of the Plaintiffs' Brief. This Court seems to be relying on its own conclusion that the emergency brake in the truck in question was in need of adjustment as a matter of law at the time of the accident. This was a jury issue and the Trial Judge properly submitted

this issue to the jury. The jury could believe the Ford supervisor of design analysis when he testified that the adjustment position of the brake as found by Mr. Carroll after the accident was not "improper." The supervisor of design analysis was asked at the time of his video tape deposition to view the enlarged photograph taken by Mr. Carroll shortly after the accident. This photograph was marked as Plaintiffs' Exhibit 9 and is reproduced in smaller print as Exhibit 8-C on page 510 of the Appendix. The video tape deposition was presented to the trial judge and jury as part of the evidence in this case. While viewing the enlarged photograph (Exhibit 9) the supervisor of design was asked:

> "Assume that that is in the same applied position on that photograph . . . is the adjustment of the brake in any way improper for it to be in the position that it is?"

The jury was entitled to believe the immediate answer of the design supervisor, namely:

> "It doesn't look like it to me." (R. 627).

Ford's representative did not even find anything improper with the adjustment position of the emergency brake at the time of the accident. This Court has unfairly ruled on appeal in direct contradiction to the facts as they were presented to the Trial Judge and jury.

11. The legal principles set forth in the cases cited in this Court's opinion were never advanced by Ford. In fact, the cases cited in this Court's opinion do not justify this Court's conclusion. The admiralty case of *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 cited on page 5 of the opinion involved a case which was reversed because of an improper instruction to the jury. The case was returned to the Trial Court for a trial on jury issues. The admiralty case of *Doucette* v. *Vincent*, 194 F 2 834 cited on page 5 of the Court's opinion dealt with the issue of whether a

trial judge abused his discretion in excluding evidence. This Court's opinion at page 5 cites the case of *Weakley* v. *Fischbach & Moore, Inc.*, 515 F (2) 1260, for the proposition that the fact that there are other design alternatives available is not a sufficient standard. The *Weakley* case held that there was:

> ". . . a consensus among electricians and designers that the equipment in question was safe if properly installed. There was also uncontradicted testimony that the design of the isolator switch was consistent with good engineering practice, . . . electricians and designers were agreed that the substitution of jumper wires for the door switches was a substantial and unjustified departure from design requirements . . . Against this evidence that the equipment was reasonably safe as designed, Fischbach and Moore mustered little contrary evidence . . . (page 1268) . . . it produced no expert testimony to support its contention that the design was unreasonably dangerous." Page 1269.

The evidence in the instant case was substantially different from the *Weakley* case. In the instant case, two experts for the Plaintiffs testified that the design of the emergency brake's location and height did *not* conform to good engineering practices. Ford did *not* offer any expert testimony that the brake did conform to good engineering practices. The Plaintiffs' experts were virtually uncontradicted. The *Weakley* case is not applicable to the facts in the instant case. This Court's opinion at page 6 cites the case of *Brown* v. *General Motors Corp.*, 355 F (2) 814. The *Brown* case held that acts of the plaintiff and co-employee in touching a starter button to rotate a drive shaft facilitating lubrication established utter want of compliance with the condition that the machine be operated in the manner intended. The decision claimed that the co-employee was "groping in the dark." 355 F(2), at page 820. In the *Brown*

decision there was *no* expert testimony that the manufacturer was negligent in removing a micro switch and substituting therefor a shield. The plaintiff claimed there should have been a micro switch but presented no evidence that lack of a micro switch was negligence. The evidence in the instant case differs substantially from the *Brown* case. In the instant case there *was* substantial evidence, through experts, that Ford was negligent in the design of the emergency brake. Also, on page 6 of this Court's opinion, it is stated that:

> "*Brown* was cited with approval by the New Hampshire Court in *Murray* v. *Bullard Co.*, post."

The *Murray* v. *Bullard Co.* case, 110 NH 220 cited the *Brown* case merely for the general principle that a manufacturer is entitled to assume that a product will be put to normal use. *Murray* v. *Bullard,* 110 NH at page 225. In its opinion at page 8, *Kaczmarek* v. *Mesta Mach Co.,* 463 F (2) 675 is cited by this Court. The *Kaczmarek* case involved an action against a manufacturer of a chain used as a component part of a pickling machine. The machine had malfunctioned. There were no witnesses because the injured party died. Experts testified that the chain caused the accident. However,

> "No evidence is present in the record going to the specific nature of the defect in the chain." 463 F (2) at page 678.

Also, the chain had changed from the one-inch density as supplied as a result of two years use. 463 F (2) at page 678. The *Kaczmarek* case is substantially different from the instant case. In the instant case there was expert evidence of the specific nature of the defect in the brake. In the instant case, as stated before, there was sufficient evidence for the jury to determine that the product was being used as was reasonably anticipated by Ford. The abstract legal principles cited in the Court's opinion do not justify this

case from the jury since there was abundant evidence to establish that there was no violation of the mandates of these principles.

12. This Court's decision is contrary to the law of New Hampshire. Under well-established principles, this Court is obligated to apply the law of New Hampshire to the evidence in this case. There is no question that the Supreme Court of New Hampshire would hold that there was sufficient evidence in this case to support the jury's finding of liability. In fact, no case can be found throughout the country which goes as far in taking issues from the jury as this Court's opinion in the instant case. Only two New Hampshire decisions are relied upon by this Court in its opinion, namely, *Murray* v. *Bullard,* 110 NH 220 at page 8 of the opinion and *McLaughlin* v. *Sears, Roebuck & Company,* 111 NH 265, at page 7 of the opinion. The Court cites the case of *Murray* v. *Bullard Company* for the principle that the Defendant is not liable where injury results from failure to keep the manufactured product in good working order. The *Murray* v. *Bullard* decision upheld a verdict for the Plaintiff against a manufacturer of a machine and held that this principle is the same as the principle of "intervening cause". See page 222 of 110 NH 220. The New Hampshire Supreme Court held that the Defendant's seventh request for instructions to the jury in this case, namely:

> "If you find that the Plaintiff's injuries were solely due to an independent intervening cause, namely, the failure of . . . the Plaintiff's . . . employer . . . to properly keep the clutch . . . in proper adjustment, which the Defendant . . . could not reasonably be found to have the duty to foresee, and that this failure was the proximate cause of the injuries, then you must bring back a verdict for the Defendant."

In other words, the New Hampshire Supreme Court has stated that the issue of the failure to keep the manufactured product in good working order *is a jury issue.* In the instant case, the jury could very well conclude that the truck in the instant case had been properly maintained under the standards of what would be required of an ordinary truck owner. The instant case is no different from the *Murray* v. *Bullard* decision. In its opinion, this Court has also cited the New Hampshire case of *McLaughlin* v. *Sears, Roebuck & Company.* The *McLaughlin* case specifically *sustained an exception to a non-suit* and granted the plaintiff a new trial based on the New Hampshire Supreme Court's determination that it was a *jury issue* as to whether the use of the manufactured product constituted a misuse or an abnormal use for which the manufacturer was not responsible. In the *McLaughlin* case the Court also stated that:

> ". . . a manufacturer or supplier has distributed a defective product when it is so fragile that its anticipated use is likely to create a dangerous condition." 111 NH 265 at page 268.

There is no case in New Hampshire which has ever held that these issues can be taken from the jury by judicial fiat. In the instant case, the Trial Judge, who was in a better position to judge the quality of the evidence and who is familiar with the New Hampshire law, found that a jury issue exists.

13. In the instant case, the Plaintiff is not claiming that the brake assembly should be perfect and that he not be required to maintain it or make use of the adjustment feature. The Plaintiff is only maintaining that the location and height of the brake lever should have been designed so as to be *reasonably* safe for a use that could *reasonably* be anticipated. These were *jury* issues.

14. It was for the *jury* to say whether the accident was caused by improper maintenance of the truck. It was for the *jury* to say whether the owner of the truck neglected to make proper use of the adjustment feature provided. It was for the *jury* to say whether the "wear," if any, was apparent. It was for the *jury* to determine whether the wear, if any, of the product was "easily remedial by a design provision." All of the above determinations were made as a matter of law by the Circuit Court when, in fact, there was abundant evidence from which the *jury* could reasonably reach a contrary conclusion.

15. For all of the reasons set forth in this Petition, the Plaintiffs will be denied constitutional rights of due process and trial by jury if this Court permits its present decision to stand.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,
PLAINTIFFS, APPELLEES,
v.
FORD MOTOR COMPANY,
DEFENDANT, APPELLANT.

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.
PETITION FOR REHEARING, ETC.
MEMORANDUM AND ORDER ON

Entered April 26, 1976

The petition for rehearing makes points that fall into two categories. The first falls outside the prime purpose of a petition, viz., to present errors of consequence that might reasonably be thought to have materially affected the outcome. It is totally irrelevant to the decision that we spoke of plaintiff, rather than the corporation, as being the truck's owner.* The difference between driving "regularly," and "quite often," is equally frivolous. So, too, so far as the present posture is concerned, is what plaintiff claims defendant claims.

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* Note that Plaintiff in his opening, spoke of "his 1972 Ford truck," and in his testimony referred to the corporation as his "own construction business," and that he was in "business for [him]self."

Secondly, in addition to being of substantive importance, a petitioner's contentions must be consistent with his position at the trial. We cannot accept plaintiff's present contention, twice repeated, that the jury could find that "the truck *was* properly maintained, the adjustment feature was reasonably utilized." (Emphasis in orig.) Plaintiff himself testified that so far as he was aware "no adjustments or repairs of any type had been made to that handbrake." No witness testified to the contrary.

Equally inconsistent is his objection to the court's statement that the lever at the time of the accident came to within 3" of the seat, when "the distance [then] may have been more." Plaintiff's brief relied on his expert's opinion, which predicated 3". Of more general import, the whole theory of the experts, and of plaintiff's brief, was that the lever was too close to the seat—"interference with the seat when the seat was in its most forward position." If we made the distance too short, this was not a mistake in plaintiff's disfavor.

Finally, we note plaintiff's present claim that the jury could have found that the brake lever was located too close to the seat in the first place, and that any wear was imperceptible. We pass the inconsistency between this and the complaint discussed in our previous paragraph, but cannot pass over what plaintiff advanced in his opening as the theory of his case.

> "[A]s the brake lining wears, which is anticipated, then the travel of the lever of the brake then becomes greater in its rearward movement, and the wearing of the brake lining makes the travel, as I say, of the rearward movement of the brake greater. The function of the brake is still adequate, but with use, as it is applied, its travel goes further. And, as it would travel further rearward, this risk of interference with the seat would become greater. If a person of short stature is in the

truck, the truck [sic] has to be in its most forward position, and if the brake lining was worn, which can be anticipated *and seen by the driver,* then you have the interference as is shown in the photograph which is before you." (Emphasis suppl.)

This language was substantially repeated in plaintiff's brief on appeal. His witness's testimony corresponded. But if we were to think the record permitted plaintiff's present argument, then he is in the position of having driven the truck for over a year during all of which time the seat interfered with the proper application of the brake.

The petition is denied, as are plaintiff's other motions.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,

PLAINTIFFS, APPELLEES,

v.

FORD MOTOR COMPANY,

DEFENDANT, APPELLANT.

MOTION TO STRIKE FROM MEMORANDUM AND ORDER ENTERED APRIL 26, 1976 THE REFERENCE TO PLAINTIFF'S OPENING STATEMENT, OR FOR ALTERNATIVE RELIEF

Now Come the Plaintiffs, Ernest F. Mitchell, Jr. and Rose L. Mitchell, in the above-entitled matter and respectfully move to strike from the Memorandum and Order on Petition for Rehearing, etc., entered by this Court on April 26, 1976 the reference to the Plaintiffs' Opening Statement wherein it is quoted *"and seen by the driver . . ."* or, in the alternative, remand this case for an evidentiary hearing on the correctness of this statement in the record, and the Plaintiffs assign as reasons therefor, the following:

1. The statement reported therein was not correctly reported. The Plaintiffs' counsel's position was that the conditions stated can be anticipated *and foreseen by the designer.*

2. In the very next paragraph of the Opening Statement, Plaintiffs' counsel related the claim that the designer had the duty to warn of these conditions. (R. 23). In fact, the entire Opening Statement in the paragraphs preceding and

following the quoted language related to the designer's responsibilities (R. 22 and 23). The quoted report of the Opening Statement is clearly a mistake.

3. Allowing the present record to stand will be unjust.

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,

PLAINTIFFS, APPELLEES,

v.

FORD MOTOR COMPANY,

DEFENDANT, APPELLANT.

MOTION FOR RECONSIDERATION

Now Come the Plaintiffs, Ernest F. Mitchell, Jr. and Rose L. Mitchell, in the above-entitled matter and respectfully move that this Court reconsider its order denying Plaintiffs' Petition for Rehearing and other motions, said order entered April 26, 1976, and the Plaintiffs assign as reasons therefor, the following:

1. The record reveals that the Plaintiffs' Petition for Rehearing and Application for In Banc Rehearing was presented to three judges who voted not to rehear this matter in banc. The record also reveals that one of the judges voting on whether to rehear the case in banc is a senior judge. In the case of *Moody* v. *Albemarle Paper Company,* decided June 17, 1974, 417 U.S. 622, 41 L. Ed. 2d 358, 94 S. Ct. 2513, the United States Supreme Court held that a senior judge may *not* participate in the determination whether to rehear a case in banc. The *Moody* case was cited by the Plaintiffs in their application previously filed.

2. The reported decision of this Court is based on an assumption by this Court that the awkward application of

the emergency brake must have been known by Mr. Mitchell before the accident and, therefore, could have been corrected by brake adjustment. This is an issue which was raised by the Court in its reported decision although *never* argued at trial or on appeal.

3. It was clearly the Plaintiffs' position at trial that Mr. Mitchell ". . . had used the parking brake during his use of the truck before the accident and *never had any particular diffiiculty under the circumstances in which he used it before the accident in June of 1973.*" R. 24, Plaintiffs' Opening Statement. (Emphasis supplied).

4. This Court failed to consider in ruling on the Petition for Rehearing the fact that the sudden stress emergency application of the emergency brake was the circumstance which made the awkward application of the brake a situation where "something suddenly went wrong."

5. In the ruling on the Petition for Rehearing this Court states that it was the Plaintiffs' trial and appellate position that the conditions were known by the driver. On the contrary, Mr. Mitchell testified that he didn't ". . . encounter any difficulty in using the brake prior to the accident." R. 284. *None* of the witnesses in this case testified that the dangerous conditions were obvious to Mr. Mitchell. Even Mr. Carroll, whose testimony was relied upon heavily by this Court in its reported decision, did not state that the conditions were obvious. Of course, Mr. Carroll does work for Ford (R. 158 and 159; See the NH case of *Alvin Greenland* v. *Ford Motor Company*, decided October 31, 1975, involving a verdict for Ford in which Mr. Carroll was the expert who testified for Ford) and the weight of his testimony should have been determined by the jury. This Court now says that the position that the brake wear conditions were seen by the driver "was substantially repeated in Plaintiffs' Brief on appeal."

This Court in its reported decision criticized the Plaintiffs for arguing in their Brief that the defect was not obvious, but now it is claimed in the order of April 26, 1976 that Plaintiffs' Brief admitted that the brake wear was perceptible. Plaintiffs' original pleadings stated:

> "On June 15, 1973, the Plaintiff, Ernest Mitchell, Jr., *who was unaware of said defects* . . . (R. 5) . . . The Defendant, Ford Motor, had *no reason to believe* that the Plaintiff, Ernest F. Mitchell, Jr. *or anyone in the position of the Plaintiff would realize the dangerous defects* and conditions of said truck." (R. 6) Emphasis supplied).

The Plaintiffs continuously maintained this position right through appeal to this Court. The mistake in the reporting of the Opening Statement should not, in fairness, be relied upon to claim the Plaintiffs took a position contrary to that actually taken.

6. This Court did not consider the constitutional issues raised in the Petition for Rehearing. Seventh and Fourteenth Amendments to the United States Constitution.

7. Any evidence quoted by this Court from the transcript to attempt to justify its view of the facts can be controverted by stronger evidence quoted by the Plaintiffs to justify their position. No matter how many facts can be viewed one way or another, there is one fact which cannot be denied, namely, that this Court has taken from Mr. and Mrs. Mitchell something that is rightfully theirs, the right to a jury trial, a right which the New Hampshire Constitution has declared to be "held sacred." Article 20, New Hampshire Constitution.

APPENDIX F

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,

PLAINTIFFS, APPELLEES,

v.

FORD MOTOR COMPANY,

DEFENDANT, APPELLANT.

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.

MEMORANDUM AND ORDER ON
MOTION TO STRIKE, ETC.

Entered May 4, 1976

PER CURIAM. Without pausing to weigh the pros and cons, the Court is content to accept Plaintiff's statement, and to substitute plaintiff's phrase "and foreseen by the designer," for the transcript phrase "and seen by the driver." (Also to strike the phase "(Emphasis suppl.).")

This does not affect the result. The purpose of making this quote was to point out that Plaintiff's case was predicated on there having been wear, which changed the location of the lever vis-a-vis the seat. If the substitution is made, so as to say that the change should have been foreseen by the designer, it is still a claim that there was in fact a change—or there would have been nothing to foresee, or operative negligence.

We stand on the rest of our opinion and prior memoran-

dum. Plaintiff's claim that he was unconstitutionally deprived of a jury trial, taken at its face value, would mean that a verdict could never be directed.

Except as above, all motions are denied.